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**THE CONCEPT AND APPLICATION OF ḌAMĀN
IN ISLAMIC COMMERCIAL LAW**

By

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DOCTOR OF PHILOSOPHY
APRIL 1994.**



بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ
لَا إِلَهَ إِلَّا اللَّهُ رَبُّ الْعَالَمِينَ
وَالصَّلَاةُ وَالسَّلَامُ عَلَى خَاتَمِ الْأَنْبِيَاءِ وَرُسُلِهِ

*In the Name of Allah,
the Compassionate, the Merciful,
Praise be to Allah, Lord of the Universe,
and Peace and Prayers be upon
His Final Prophet and Messenger*

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

اقْرَأْ بِاسْمِ رَبِّكَ الَّذِي خَلَقَ ﴿١﴾ خَلَقَ الْإِنْسَانَ مِنْ عَلَقٍ ﴿٢﴾ اقْرَأْ وَرَبُّكَ
الْأَكْرَمُ ﴿٣﴾ الَّذِي عَلَّمَ بِالْقَلَمِ ﴿٤﴾ عَلَّمَ الْإِنْسَانَ مَا لَمْ يَعْلَمْ ﴿٥﴾

العلق ١. د

Read in the name of your Sustainer, Who has Created man out of a germ cell.
Read—for your Sustainer is the Most bountiful One.
Who has taught (man) the use of the pen.
Taught Man what he did not know.

(Qur'an 96:1-5)

وَاللَّهُ أَخْرَجَكُمْ مِنْ بُطُونِ أُمَّهَاتِكُمْ لَا تَعْلَمُونَ شَيْئًا وَجَعَلَ
لَكُمْ السَّمْعَ وَالْأَبْصَارَ وَالْأَفْئِدَةَ لَعَلَّكُمْ تَشْكُرُونَ ﴿٧٨﴾

النحل ٧٨

And Allah has brought you forth from your mother's wombs knowing
nothing—but He has endowed you with hearing, and sight, and minds, so
that you might have cause to be grateful

(Qur'an 16:78)

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The present writer is aware both as a student and a Muslim about man's inability and weaknesses in his search for knowledge, unless assisted and willed by Allāh. In this respect, I record the normative statement, as a celebrated dictum, with which the classical '*ulamā*' concluded their written academic works: "This written work is accomplished only by the grace of Allāh and He knows best what is true and right. All gratitude and praise be only to Him."

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ABSTRACT.

This study deals with an important concept in *fiqh* known as *ḍamān*. Despite its universal usage in various areas of law, including that of criminal law and law of torts especially in facilitating award of compensation, this study will confine its survey within the bounds of commercial transactions. *Ḍamān* forms one of the most complicated subject-matters in the Islamic Law of Obligation. In this context, *ḍamān* is generally perceived as civil liability in the widest meaning, arising from the non-performance of contractual obligation, violation of trust, misrepresentation and unlawful enrichment. Firstly, this study will discuss suretyship, as *ḍamān* is, to some extent, treated as synonymous with *kafālah* by the jurists. Secondly, *ḍamān* will be surveyed as a method of redress of any contractual irregularities under the notion of *gharāmah*. Such practices are motivated by the *Sharī'ah* doctrines of *maqāṣid shar'īyyah* (objectives of the law), upholding the concept of *lā ḍarara wa lā ḍirār* (no harm shall be inflicted or reciprocated) and respecting the notion of sanctity of legitimate ownership (*ḥurmat al-milkiyyah*) and freedom of contract (*ḥurriyat al-ta'āqud*). Methods of establishing liability (*turuq ithbāt al-ḍamān*) and its waivers (*al-i'fā' min al-ḍamān*), provision of redress (*mabda' al-ta'wīd*) and the institutional framework which are involved in it are then discussed.

The study will be concerned with the prescriptions of the Qur'ān and Sunnah on *ḍamān* and their explanations in the classical manuals of Islamic Law. In addi-

tion, certain post-classical texts offering specific treatment of *ḍamān*, particularly al-Baghdādī's *Majma' al-Ḍamānāt* and al-Ma'danī's *Tadmīn al-Ṣunnā'* will be studied. Also, decisions by juristconsults of various localities, recorded in various collections of *fatāwā* and court decisions in the literature of *adab al-qadā'*, will be examined to enhance our knowledge of the way *ḍamān* has been treated. For the purpose of systemization, texts of *Uṣūl al-Fiqh* and *Qawā'id Fiqhiyyah* are essential. Similarly, evidence on the economic history of Muslim civilization in the form of actual contracts, letters, business records and institutional operations, are examined. The research also relies heavily on the codifications of Islamic law like the Ottoman *Majallat al-Aḥkām al-'Adliyyah*, Qadrī Bāshā's *Murshid al-Ḥayrān* and the Ḥanbalīs *Majallat al-Aḥkām al-Shar'īyyah*. Finally, an analysis of the contemporary legislations in Egypt, the United Arab Emirates and Malaysia will prove that a classical concept like *ḍamān* is still vital for modern commerce. This also lays stress on the importance of neo-*ijtihād* to ensure ability and competence to apply *ḍamān* to fresh problems in commercial life.

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A NOTE ON TRANSLITERATION AND ITS TABLE.

There is no universally recognized system of transliterating Arabic into the Latin alphabet. In this work, the transcription system used by the *Encyclopaedia of Islam (New Edition)*, with some modifications, has been adopted. The NB Lingua software produced by the Technology Group Inc. has been used to prepare the transliteration, and their version of ‘ayn and hamzah is adopted accordingly. All letters are fully represented which means that *tā’ marbūṭah* at the end of a word is vocalized as *h*, instead of being normally omitted. When *tā’ marbūṭah* occurs in the first member of an *idāfah* (genitive), it is represented as *t*.

Consonants.

alif	a, ʾ (hamzah)
bāʾ	b
tāʾ	t
thāʾ	th
jīm	j instead of dj
ḥāʾ	ḥ
khāʾ	kh
dāl	d
dhāl	dh
rāʾ	r
zāy	z
sīn	s
shīn	sh
ṣād	ṣ
ḍād	ḍ
ṭāʾ	ṭ
ẓāʾ	ẓ
‘ayn	‘ replacing inverted apostrophe
ghayn	gh
fāʾ	f

qāf	q instead of k
kāf	k
lām	l
mīm	m
nūn	n
hāʾ	h
wāw	w
yāʾ	y

Vowels.

Long	: ā, ū, ī
Doubled	: iyy, uww
Diphthongs	: aw, ay

LIST OF ABBREVIATIONS.

- Adab al-Qaḍā'** Ibn Abī al-Damm, *Kitāb Adab al-Qaḍā'*.
- Arbitration** Samir Salleh, *Commercial Arbitration*.
- Ashbāh.N** Ibn Nujaym, *al-Ashbāh wa 'l-Nazā'ir*.
- Ashbāh.S** al-Suyutī, *al-Ashbāh wa 'l-Nazā'ir*.
- A'lām** Ibn Qayyim, *A'lām al-Muwaqqi'in*.
- Badā'i'** al-Kāsānī, *Badā'i' al-Ṣanā'i'*.
- Civil** C.A.Hooper, *The Civil Law of Palestine*.
- Commercial** Coulson, *Commercial Law in the Gulf State*.
- Ḍamān** 'Alī al-Khafīf, *al-Ḍamān fī 'l-Fiqh al-Islāmī*
- Durar** 'Ali Ḥaydar, *Durar al-Ḥukkām*.
- EI(1)** *Encyclopaedia of Islām* [1st edition]
- EI(2)** *Encyclopaedia of Islām* [2nd edition]
- Egyptian** *Egyptian Civil Code*.
- Falsafat** S.Maḥmaṣṣānī, *Falsafat al-Tashrī'*.
- Fatāwā** Ibn Taimiyyah, *Majmu' Fatāwā*.
- Fiqh Islāmī** Wahbah al-Zuhaylī, *al-Fiqh al-Islāmī wa Adillatuhu*.
- Fi'l Ḍār** Muṣṭafā Zarqā', *al-Fi'l al-Ḍār wa al-Ḍamān fih*.
- Introduction** J.Schacht, *Introduction to Islamic Law*.
- Justice** Majid Khadduri, *Islamic Conception of Justice*.
- Kafālah** 'Alī al-Sālus, *al-Kafālah fī Ḍaw' al-Sharī'ah*.
- Lexicon** E.W.Lane, *Arabic-English Lexicon*.
- Lisān** Ibn Manzūr, *Lisān al-'Arab*.
- Ma'ālim** Ibn Ukhuwwah, *Ma'ālim al-Qurbah*.
- Mabsūṭ** al-Sarakhsī, *Kitāb al-Mabsūṭ*.
- Madhāhib** al-Jazīrī, *Kitāb al-Fiqh 'alā 'l-Arba'ah*.
- Madkhal** Muṣṭafā Zarqā', *al-Madkhal al-Fiqh al-'Āmm*.
- Maj.'Adliyyah** *Majallat al-Aḥkām al-'Adliyyah*.
- Maj.Shar'iyyah** *Majallat al-Aḥkām al-Shar'iyyah*.
- Majma'** al-Baghdādī, *Majma' al-Ḍamānāt*.
- Maritime** D.Rice-Noble, *Principles of Islamic Maritime Law*.
- Maṣādir** al-Sanhūrī, *Maṣādir al-Ḥaqq*.

Minhāj	al-Nawawī, <i>Minhāj al-Ṭālibīn</i> [Tr. E. C. Howard].
Muʿīn	al-Ṭarābulusī, <i>Muʿīn al-Hukkām</i> .
Mughnī	Ibn Qudāmāh, <i>al-Mughnī</i> .
M. Muḥtāj	al-Khatīb, <i>Mughnī al-Muḥtāj</i> .
Muhadhdhab	al-Shirāzī, <i>al-Muhadhdhab</i> .
Mūjabāt	Ṣubḥī Maḥmaṣṣānī, <i>Naẓariyyat al-Mūjabāt wa ʿl-ʿUqūd</i> .
Mukhtaṣar	Khalīl bin Ishāq, <i>al-Mukhtaṣar</i> [tr. Ruxton].
Murshid	Qadrī Bashā, <i>Murshid al-Hayrān</i> .
Mutlifāt	Sulayman Aḥmad, <i>Ḍamān al-Mutlifāt</i> .
Muwaṭṭaʿ	Mālīk bin Ānas, <i>al-Muwaṭṭaʿ</i> .
Naz. Ḍamān	Wahbah al-Zuḥaylī, <i>Naẓariyyat al-Ḍamān</i> .
Naz. Ḍamān ʿĀmm	Fawzī Fayḍ Allāh, <i>Naz. al-Ḍamān fī ʿl-Fiqh al-ʿĀmm</i> .
Partnership	Abraham Udovitch, <i>Partnership and Profit</i> .
Qawāʿid	Ibn Rajab al-Ḥanbalī, <i>al-Qawāʿid</i> .
Qawāʿid Aḥkām	ʿIzz al-Dīn Abd al-Salām, <i>Qawāʿid al-Aḥkām</i> .
Qawānīn	Ibn Juzay, <i>Qawānīn al-Fiqhiyyah</i> .
Q.	<i>al-Qurʾān al-Karīm</i> .
Sales	Abdullah Alwi Hassan, <i>Sales and Trade</i> .
Sh. Atāsī	al-Atāsī, <i>Sharḥ al-Majallah</i> .
Sh. Bāz	S. Rustam Bāz, <i>Sharḥ al-Majallah</i> .
Sh. Zarqāʿ	M. Zarqāʿ, <i>Sharḥ al-Qawāʿid al-Fiqhiyyah</i> .
Sulṭāniyyah	al-Mawārdī, <i>al-Aḥkām al-Sulṭāniyyah</i> .
Tabṣirat	Ibn Farḥūn, <i>Tabṣirat al-Hukkām</i> .
Taḍmīn	al-Maʿdanī, <i>Taḍmīn al-Ṣunnāʿ</i> .
ʿUqūd	Wahbah al-Zuḥaylī, <i>ʿUqūd Musammāh</i> .
UAECC	<i>United Arab Emirates Civil Code</i> .
Umm	al-Shāfiʿī, <i>Kitāb al-Umm</i> .
Wajīz	al-Ghazālī, <i>al-Wajīz</i> .

JOURNALS.

ALQ	<i>Arab Law Quarterly</i>
AJCL	<i>American Journal of Comparative Law</i>
AJISS	<i>American Journal of Islamic Social Science.</i>
BSOAS	<i>Bull. of Sch. of Oriental & African Studies.</i>
JAOS	<i>Journal of American Oriental Society</i>
JESHO	<i>J of Soc. & Economic Hist. of the Orient.</i>
JRAS	<i>Journal of the Royal Asiatic Society.</i>
IC	<i>Islamic Culture</i>
ICLQ	<i>International & Comparative Law Quarterly.</i>
IQ	<i>Islamic Quarterly</i>
IS	<i>Islamic Studies</i>
MLJ	<i>Malayan Law Journal</i>
MW	<i>Muslim World</i>
SI	<i>Studia Islamica</i>

Cases Referred to or Cited

Abdullah Fashid Hilal v. International Bank of Credit and Commerce [1979] Civil Appeal no.5 Dubai.

Asphalt Company Ras al-Khaimah & Bank of Oman v. Lloyds Bank Internatinonal Limited RAK Civil Court [Suit no.397/78 [1978]].

Al-Shirawi Trading and Contracting Co. v. Muhammad +Abd al-Rahman al-Bawardi Dubai Supreme Court of Appeal [Civil Division] App. No.59/79 [1979]

Bank Islam Malaysia Bhd. v. Tinta Press Sdn.Bhd. & Ors. [1986] 1 MLJ 256-259.

Beecham Group Ltd. v. M.A.Zamimi Pima & Co. [Case No.1378/77G Civil Court of Abu Dhabi]

Kuwaiti Oil Company v. Idemitsu Tankers K.K. [The Hida Maru] [1981] 2 Lloyd's Rep.210.

McDonald's Co. v. H.Arzuni [Case No. 535/80 Civil Court Abu Dhabi].

Rector of al-Azhar v. President & Prime Minister of Egypt
and Others [1980] Case No.20, Judicial Year 1.

Saudi Arabia v. Arabian American Oil Company [ARAMCO]
Arbitration [Geneva Award 23 August 1958]

Terminiello v. Chicago [1949] 337 U.S. 1

Tinta Press Sdn.Bhd. v. Bank Islam Malaysia Bhd. [1987] 2
MLJ 192-195.

Thani Ben Murshid Co. & the African Co. v. Refrigerator
al-Nawis Company [Case No. 3 20/72 Civil Court Abu Dhabi]

SPECIAL NOTE.

It is important to mention here that the term God occurring in the thesis is referring to *Allah* normally used in the Islamic literature particularly that written in Arabic. Further, it was extremely difficult for the writer to pronounce the formula, which^{is} normally rendered in English as "peace be on him" after mentioning the Prophet Muhammad and the other Prophets, and "God be pleased with them" and "God have mercy on them" in respect to the Companions or the Successors and other revered personalities in Islam.

The difficulty of including these formulae is evident because they would have sometimes appeared many times in a single page. In consequence to that, these formulae may be regarded as understood and may be taken for granted.

INTRODUCTION.

Law is a system of social control established for the purpose of maintaining an ordered society among men. Different societies developed different legal systems, but every mature system reveals the way in which the society, from which it sprang, endeavours to protect what it honours. Islamic law, which is perceived by Muslims as a divinely ordained system alongside Islām's centuries of experiences, is the embodiment of the Islamic ideal life. The *Sharī'ah*, the Islamic code of life and the fountain of the Islamic legal philosophy, is nothing but a divine guidance and an embodiment of God's Will and Justice.¹

Underlining its concept of the sanctity of private ownership, the *Sharī'ah* has enjoined that a property owned by a rightful owner must be honoured and protected from any kind of outrage. An outrage will normally result in loss and suffering to the affected party and they need to be protected. In this respect, the *Sharī'ah* has prescribed rules on *ḍamān* in pursuit of protecting legitimate ownership and to prevent the injurious consequences (*darar*) of any outrage. In commercial transactions, other than the mainstream discussion in fiqh literature on tortious and delictual liabilities, *ḍamān* has been accepted as an important hallmark in the

¹ Majid Khadduri, *Islamic Jurisprudence : Shāfi'ī Risālah*, Baltimore, 1955, p.3.

Sharī'ah's primary objectives of establishing justice (*‘adālah*) and general interest (*maṣlahah*).²

Questions on *ḍamān* form one of the most complicated subject-matters in the Islamic law of obligation. Liability may arise from the non-performance of contract³ and from tort⁴ or from the combination of both. The depository and other persons in a position of trust (*amānah*) are not liable for any accidental loss. They will only lose this privileged position through *ta‘addī*, an illicit act which is incompatible with the fiduciary relationship. In this regard, Islamic law distinguishes liability for the effect of an unlawful act or delict, from liability for an act contrary to a contract and it discusses both kinds of liabilities whenever they happen to arise concurrently.⁵

This present research is an attempt to examine the principle of *ḍamān* as developed in the various legal treatises of the *fuqahā’* which cover all areas of

²A group of legal theorists (*uṣūliyyun*) insisted that *maṣlahah* is the primary purpose of legislation and should be the basis of every legal decision. *Maṣlahah* means human or public good, interest, welfare and utility. A major work devoted to the study of this concept is *al-Muwāfaqāt fi Uṣūl al-Shar‘iyyah* by Abū Ishāq Ibrāhīm b. Musā b. Muḥammad al-Lakhmī al-Shāṭibī. The original title of this work is reported to be *‘Unwān al-Ta‘rīf bi Asrār al-Taklīf*. The value attached to this work is such that al-Shāṭibī has even been accorded the rank of a *mujaddid*. This work conveys al-Shāṭibī's development of legal philosophy known as the doctrine of *al-maqāsid al-shar‘iyyah* (objectives of Islamic law). For details see Muḥammad Khālid Mas‘ūd, *Islamic Legal Philosophy : A Study of Abū Ishāq al-Shāṭibī's Life and Thought*, Islamabad, 1977, p.111. Also see Muḥammad al-Ṭāhir al-‘Ashūr, *Maqāsid al-Shar‘iyyah al-Islāmiyyah*, Tunis, 1946, p.63.

³In fiqh works, it is known as *‘aqd* : a binding contract between contracting parties which will give rise to various legal consequences primarily performance of the terms and conditions of the contract. Surveys on *‘aqd*, in various branches of law, have occupied a substantial portion in fiqh manuals. See *Majābāt*, p.277.

⁴It is known as civil wrong (*mas’ūliyyat al-taqṣīriyyah*). In the classical fiqh works, the term *ta‘addī* has been employed. The later jurists are using terms like *al-fi‘l al-dār*. See *Fi‘l-Dār*, p.60-63. Other terms used are *ḍamān* and *ta‘wīd*. However, the term *ḍamān*, according to Muṣṭafā Zarqā’ is preferred and adopted by the Jordanian Civil Code as it is the most popular term used by the scholars and best represents the intended meaning.

⁵*Introduction*, pp.147-148.

commercial transactions. All these matters are viewed under the notion of general liability (*iltizām*), suretyship (*kafālah*), indemnity (*gharāmah*) and the protection of legitimate rights under the notion of *al-ḥifẓ*. In light of the sophistication of commercial life due to changes in social and economic milieu, the emergence of new issues in commerce associated with the application of *ḍamān* such as insurance (*ta'mīn*), usage of various banking and negotiable instruments (*ʿamaliyyat al-bunūk wa ʿl-maṣārif*) and others, will be examined.

Briefly, the research is geared towards evaluating provisions of Islamic law on *ḍamān* in respect of various protections given to parties taking part in any commercial activities. This will begin by examining classical legal manuals of various *madhāhib* (schools of law), comparing them and finally will exercise the process of evaluation (*tarjīḥ*) in order to extract the most practical principle. The discussion on *ḍamān* under *Kitāb al-Ḍamān* is in most manuals very brief. However, this concept is discussed practically in most other chapters as all contracts will involve *ḍamān* of varying degree.⁶

A new dimension will be embodied in this research that is the study of a few selected exclusive work on *ḍamān*. Being different from the established methods adopted by the all-embracing manuals, these exclusive works concentrate solely on the question of *ḍamān*. This is done by a later generation of jurists espe-

⁶A detailed elaboration has been carried out in *Madhāhib*, vol.IV, pp. 221-237. A more recent excellent work worthy of close scrutiny is *Fiqh Islāmī*, vol.V, pp.140-150. It is also important to note that this present work will have to be based on legal manuals chosen more or less arbitrarily. Indeed, as Udovitch maintained, there can be no objection to this method if one wishes simply to investigate the various prescriptions of Muslim positive law. After all, this research is not historically oriented study. See *Partnership*, p.12.

cially from the Ḥanafī and Mālīkī schools. This research will embark on analysis of two of these exclusive treatments. Firstly, a Ḥanafī work by Ghiyāth al-Dīn Abū Muḥammad bin Ghānim al-Baghdādī (d.1030 A.H./1620 A.D.), who wrote an important compendium on *ḍamān* which has a great impact on most contemporary work on Islamic law of obligation such as *Maṣādir al-Ḥaqq* by al-Sanhūrī, *Nazariyat al-Mūjabāt wa 'l-'Uqūd* by Maḥmaṣṣānī, *Nazariyat al-Ḍamān* by Wahbah al-Zuhaylī, *al-Ḍamān fī 'l-Fiqh al-Islāmi* by 'Alī al-Khafīf and so on. His neglected work, *Majma' al-Ḍamānāt*⁷ will be one of the mainstay of this work due to its detailed treatment.

Another work is *Kitāb Taḍmīn al-Ṣunnā*⁸ by Abū 'Alī al-Ḥassan bin Raḥḥāl al-Ma'danī. It is a work devoted to the study of the civil liability of the artisans

⁷Brockelmann, *Geschichte Der Arabischen Litteratur*, vol. II, p.492 ; SII, p.502. Another work of al-Baghdādī is *Malja' al-Qaḍā' 'inda Ta'arūḍ al-Bayyināt*. See also Khayr al-Dīn Zirkli, *al-A'lām*, vol.V, p.126. The important chapters in *Majma' al-Ḍamānāt* for this study are :

- i] Chapter Four on *ijārah* covering rights and obligations of both the lessor and the lessee. The status of *ajīr khāṣṣ* and *ajīr mushtarak* has been highlighted. Liabilities of the artisans were dealt with in detail. Practically every known craft and professional services known at that time were discussed.
- ii] Chapter seven on *wadī'ah*.
- iii] Chapter eight on *rahn*.
- iv] Chapter ten on *fuḍūlī*.
- v] Chapter eleven on *itlāf*.
- vi] Chapter eighteen on *bay'*.
- vii] Chapter nineteen on *wikālah*.
- viii] Chapter twenty on *kafālah*.
- ix] Chapter twenty one on *hawālah*.
- x] Chapter twenty two on *sharikah*.
- xi] Chapter twenty three on *muḍārabah*.
- xii] Chapter twenty four on *muzāra'ah*.
- xiii] Chapter twenty nine on *da'wā*.
- xiv] Chapter thirty on *shahādah*.
- xv] Chapter thirty one on *iqrār*.
- xvi] Chapter thirty two on *ṣulh*.

⁸Ibid., S II, p.696. One J.Berque has come up with an introduction, translation and notes of this book in French, published as "*De la Responsabilite civile de l'Artisan*" in the series of Bibliotheque Arabe-Francaise, XIII, Algiers, 1949.

(*ṣunnā*), a smaller work compared to that of *Majma' al-Ḍamānāt*. Despite the size, the book is a valuable reference on the subject. There are two other works, *al-Ḍamānāt fī 'l-Furū'* by Fuḍayl bin 'Alī al-Jamālī⁹ and *al-Taḥrīr fī Ḍamān al-Ma'mūr wa 'l-Āmir wa 'l-Ājir* by Maḥmūd Affendi bin Ḥamzah al-Hamzawī¹⁰, which would undoubtedly be valuable to complement the whole endeavour, but they are not available for consultation.

Apart from the typical legal manuals and special treatises, the researcher discovered that great assistance can also be drawn from various other sources. Books of *fatawā* containing opinions of the jurisconsults of various localities can offer valuable legal thoughts. To mention a few examples, *Fatāwa al-Subkī*, *Fatāwā Ibn Nujaym*, *Fatāwa 'Alamgiriyyah* and the like. For the purpose of systematization, certain book of *uṣūl al-fiqh* and *qawā'id fiqhiyyah*, are needed. Reference to important works like *al-Ashbāh wa 'l-Nazā'ir* by both al-Suyūṭī and Ibn Nujaym, *Kitāb al-Qawā'id fī 'l-Fiqh al-Islāmī* by Ibn Rajab al-Ḥanbalī and *Qawā'id al-Aḥkām fī Maṣāliḥ al-Anām* by 'Izz al-Dīn 'Abd al-Salām are essential. Similarly, a substantial reference is made to the Ḥanafī's *Majallat al-Aḥkām al-'Adliyyah* together with its commentaries like that by Rustam Salīm Bāz, Muḥammad Khalid al-Atasī, 'Alī Ḥaydar and others. Whenever necessary, reference will be made to codifications of other schools of law as well as contemporary legislation in selected Middle-Eastern nations which is *Sharī'ah*-based.

⁹Ibid., vol.II, p.573 ; S II, p.645.

¹⁰Ibid., S II, p.775. Another work of Maḥmūd Ḥamzah on legal maxims can, at least, exemplify his opinion on *ḍamān*. See his *al-Farā'id al-Bahiyyah fī 'l-Qawā'id wa 'l-Fawā'id al-Fiqhiyyah*, Damascus : Dār al-Fikr, 1986.

There are also a number of sources containing practical experiences relating to various legal issues including that of *ḍamān*. The research discovered that the literature of *adab al-qāḍī* had recorded decisions of the judges, including those associated with *ḍamān*, which is an extensive exercise of *ijtihād*. Leading texts of this category had been consulted, namely Ibn Abi al-Damm's *Kitāb Adab al-Qaḍā'* of the Shāfi'ī school, Ibn Farḥun's *Tabṣirat al-Ḥukkām* of the Mālikī school, al-Ṭarābulusī's *Mu'īn al-Ḥukkām* of the Ḥanafī school and Ibn al-Qayyim's *al-Ṭuruq al-Ḥukmiyyah* of the Ḥanbalī school. As far as *ḥisbah* was concerned, the research relied heavily on the *ḥisbah* manuals, particularly Ibn Ukhuwwah's *Ma'ālim al-Qurbah* to demonstrate its role as the authority responsible for fair trading.¹¹ Texts written on business ethics are also valuable like *Kitāb al-Ishārah ilā Maḥāsini al-Tijārah* by al-Dimashqī.

To suit the nature of the subject-matter under consideration which concerns some points of economic history¹², it is necessary to compare the information contained in legal codes and treatises with the materials relating to its application in

¹¹There are also a number of other *ḥisbah* manuals, some of which were written before *Ma'ālim al-Qurbah* and some came later. Among the earlier work are :[a] *Aḥkām al-Sūq* by Yaḥyā b. 'Umar [d.289/901]; [b] *Fī Adāb al-Ḥisbah* by al-Saqatī [ca.500/1100]; [c] *Nihāyat al-Rutbah fī Ṭalab al-Ḥisbah* by al-Shayzarī [d.589/1193]; [d] *Nihāyat al-Rutbah fī Ṭalab al-Ḥisbah* by Ibn Bassām. See Abdulla Mansy Omari, *The Market Society of Greater Syrian Cities in the Later Middle Ages [1250-1517]*, Unpublished Ph.d Thesis, University of Wisconsin Milwaukee, 1986.

¹²In this respect Udovitch commented : " From the point of view of economic history, the ideal way to study any institution of commercial law would be to compare the information contained in legal codes and treatises with the material relating to its application to economic life as manifested by actual contracts, letters and business records found in archives and other repositories....Theoretical legal texts exist in an abundance but any corresponding documentary material is for all practical purposes not extant. In order to determine the framework in which the trade and commerce in early Islamic period was carried on - a trade known to have been active and important - we must of necessity rely on legal treatises for most of our information, while trying wherever possible to call upon whatever meagre help other literary sources may provide. See *Partnership*, p.3. See also Bernard Weiss, "Interpretation in Islamic Law: The Theory of Ijtihād," *AJCL* vol.26 [1978], pp.199-212.

economic life. This can be done by analysing actual contracts, letters, business records and other such thing. Evidence such as documents of Cairo Geniza¹³, court records of the Behrī Mamlūk and Anatolian Keyserī need a careful scrutiny. Briefly, the later development of Muslim civilization has witnessed positive developments in respect of evidences of practical commercial activities.

As has been indicated earlier, study of *ḍamān* in Islamic commercial law (*mu‘āmalāt māliyyah Islāmiyyah*) will be the primary concern of this research. It will thus exclude *ḍamān* in criminal law (*jināyāt*) and those transaction which is not purely commerce in nature. Study of *ḍamān* will operate on the basis of three important themes, namely the concept of suretyship (*kafālah*), the application of the idea of providing remedies in the form of compensation for contractual wrongs (*gharāmah*) and the notion of protection of rights (*al-ḥifẓ*) for both consumers and the businessmen from any unlawful transgression. Evidently, this immense undertaking will require a study of both legal and socio-economic development as the issue is getting more sophisticated as is human civilization itself. Fresh issue like the role of insurance (*ta‘mīn*) will be important especially when involving long-distance trade, huge capital, fluctuation of world markets and the like.

¹³See S.D.Goitein, "The Cairo Geniza as a Source for the History of Muslim Civilization", *SI*, III, 1955, pp.75-91. A more detailed account has been incorporated in a three volumes work by Prof.Goitein entitled *A Mediterranean Society : The Jewish Communities of the Arab World as Portrayed in the Documents of Cairo Geniza*, n.d.

In the concluding part, this research will analysing the trend of legislation on *ḍamān* in selected Middle Eastern nations namely Egypt¹⁴ and the United Arab Emirates.¹⁵ At the institutional level, the Malaysian Islamic Bank will be the case study, at least to see the extent of the application of *ḍamān* in its operations. This part of the study is quite nominal as the main area of the research is investigation of the classical works.

¹⁴Egypt is chosen because of its unique position amongst the Arab nations. It is mother of all the Arab world. The new Egyptian Civil Code (1949) has been adopted as a model by many countries. Egyptian lawyers and jurists have been invited to draft new civil codes of certain countries. See Ian Edge, "Comparative Commercial Law of Egypt and Arabian Gulf" *Cleveland State University Law Review* 74,[1985/86], pp.129-144. See also G.M.Badr, "The New Egyptian Civil Code and the Unification of the Laws of the Arab Country," *Tulane Law Review* vol.XXX [1956], pp.577-584 and F.J.Ziadeh, "Law of Property in Egypt: Real Rights," *AJCL*, vol.26 [1978], pp. 239-271.

¹⁵The choice of the UAE is because of its strong adherence to the *Shari'ah* in its legislation compared to the earlier codes like Egyptian Civil Code. The influence of the *Majallat al-Ahkām al-'Adliyyah* is still very strong and the era of "reassertion of the *Shari'ah*" took place when the codes were drafted. This has boosted the effort to put more Islamic input in them. See 'Uqūd, Beirut 1990. Also see William Ballantyne, "The Civil Code of the United Arab Emirates : A Further Reassertion of the *Shari'ah*," *ALQ*, Nov.1986, pp.3-34.

CHAPTER ONE

PRELIMINARY CONCEPTS OF ḌAMĀN.

“The very objective of the *Shari‘ah* is to promote the welfare of the people, which lies in safeguarding their faith, their life, their intellect, their posterity and their wealth. Whatever ensures the safeguarding of these five, serves public interest and is desirable...”

[Al-Ghazālī, *al-Mustaṣfā min ‘Ilm al-Uṣūl*, vol.I, p.139].

This chapter is concerned with a brief inquiry of *ḍamān* as an important concept found in *fiqh* literatures. Despite its universal usage, this discussion will focus on *ḍamān* in the realm of commercial transactions. The coverage of this chapter will include : [a] Definition of *ḍamān*; [b] *Ḍamān* in the Qur’ān; [c] Scope of *ḍamān*; [d] Grounds of *ḍamān* and [e] Functions of *ḍamān* in protection of rights.

1.1 Definition of ḍamān

Ḍamān literally means security or bail.¹⁶ In various dictionaries of Arabic, the term *ḍ, m, n* is used to denote suretyship (*kafālah*) and liability (*iltizām*) and in certain instances was referred to as indemnity or reparation (*gharāmah*). Ibn Manẓūr has further reinforced in his *Lisān al-‘Arab* that *ḍamān* stands for both suretyship and the general notion of liability. In addition to that, he included the notion of protection (*ḥifẓ*) because one of the noble objectives of the legislation of

¹⁶Th.W.Juynboll, “Ḍamān,” *EI(1)*, p.901. See also Editors, “Ḍamān,” *EI(2)*, p.105.

ḍamān is to protect rights and interests of mankind in their life, from any form of wrongdoing or transgression.¹⁷

Therefore, *ḍamān* have various connotations such as responsibility, accountability, suretyship and the like. *Ḍamān* is synonymous with *kafālah* but it has a wider coverage. This is due to the fact that *ḍamān* signifies more than the meaning of suretyship. Apart from suretyship, it means the concept of compensation and restitution for a destroyed property or an infringed right, by making it good, replacing the like or paying the value.¹⁸ In short, *ḍamān* is also associated with some other terms like *kafālah*, *za‘amah*, *qabālah* and *hamālah*, which are treated as bearing a similar connotation.¹⁹ Al-Māwardī has attributed to have said that *ḍamīn* has been used in respect of properties (*amwāl*), *hamīl* in cases involving criminal liabilities like *diyāt*, *za‘im* is normally applied in cases concerning costly properties (*al-amwāl al-‘izām*), *kafīl* is common in cases of personal guarantee and *ṣabīr* is a term of universal application.²⁰

Technically, the jurists have employed the term *ḍamān* in two respects, namely in suretyship (*kafālah*) and in liability (*iltizām*), identical to its literal meaning. This application has been adopted by the Shāfi‘ī, Mālikī, Ḥanbalī and

¹⁷*Lisān*, vol.VI, pp.550-551. The linguists debated the term as whether it originates from *ḍamima* which means an amalgamation of one thing to another or it stems from *ḍamina* which mean the inclusion (*idkhāl*) of something into one’s commitment. This has given rise to two different conceptual interpretation among the jurists. Based on the idea of inclusion, the Shi‘ī jurists saw *ḍamān* as the shifting (*naql*) of a debt from the *dhimma* of debtor to the surety. The mainstream opinion is that *ḍamān* which was derived from *ḍamm* means the joining of the two *dhimma*s. See ‘Izz al-Dīn Baḥr al-‘Ulūm, *Buḥūth Fiqhiyyah*, pp.24-34.

¹⁸*Lexicon*, vol.1, p.1805.

¹⁹*Sales*, pp.385-388.

²⁰Shaykh Sulaymān al-Jumāl, *Hāshiah al-Jumāl ‘ala Sharḥ al-Minhāj li Shaykh al-Islām Zakariyya al-Anṣārī*, vol.III, n.d., p.378 cited in *Fiqh Islāmī*, vol.V, p.130.

Zaydī schools of law to signify the concept of surety or guarantee. They have named the chapter on this subject as *bāb al-ḍamān* or *kitāb al-ḍamān* in their legal manuals.²¹

The Shāfi'īs defined *ḍamān* as a liability in the sense of an established obligation (*ḥaqq thābit*) belonging to one person, which has been shifted to another's *dhimmah*. It also means an obligation to produce the person guaranteed in legal proceedings or to produce the property which stood as a guarantee, as required by the interested parties. *Ḍamān* has also been associated with the contract (*ʿaqd*) to bring about such an undertaking.²²

According to the Mālikīs, *ḍamān* is the engagement of the liability of one person to another, pertaining to certain rights. Such engagement involves, *inter alia*, guarantee for property (*ḍamān al-māl*), personal guarantee (*ḍamān al-wajh*) and guarantee for claim (*ḍamān al-ṭalab*).²³ The Ḥanbalīs defined *ḍamān* as joining (*ḍamm*) the responsibility of the guarantor to the liability of the person guaranteed in respect of fulfilling of an obligation and thus becoming jointly responsible. In such cases, the claimant may claim for satisfaction of the obligation from either party.²⁴ The Zaydī school opined that *ḍamān* is establishing a debt (*dayn*) on the guarantor's liability, which, in turn, make him responsible together with the principal debtor.²⁵

²¹ *Mutlifāt*, p.29.

²² *M. Muḥtāj*, vol.II, p.198.

²³ Al-Dardīr, *al-Sharḥ al-Kabīr ʿalā ʿl-Mukhtaṣar Khalīl*, p.329.

²⁴ *Mughnī*, vol.V, p.80.

²⁵ Aḥmad b. Yaḥyā b. Murtaḍā, *al-Baḥr al-Zakḥkhār al-Jāmiʿ li Madhhab ʿUlamāʾ al-Amṣār*, 1947, vol.V, p.75.

It is also crucial to examine two related terminologies, namely *mūjib* and *iltizām*. Literally, *wajaba* and *lazima* are synonymous carrying the meaning of binding, obligatory, incumbent and due.²⁶ In its technical usage, the term *mūjib* carries three different meanings.²⁷ Firstly, *mūjib* means the person who concluded the contracting pact.²⁸ Secondly, *mūjib* also denotes the meaning of the basis that necessitate the engagement of the *dhimmah* with *ḍamān*. This has been exemplified by the dictum : “destruction is the *mūjib* (cause) of *ḍamān*” and “*ḍamān* is the duty to return a property or rendering its substitute with a similar property or its value.”²⁹ Thirdly, the term *mūjab* means the value and legal effect consequent of something like the dictum : “the *mūjab* (consequence) of a valid contract of sale is the transfer of the object of contract”. It is also known as *muqṭaḍā al-‘aqd*.³⁰

Subḥī Maḥmaṣṣānī observed that the closest concept to *mūjib* and *iltizām* in the science of sources of Islamic law is *al-wājib al-maḥdūd* whereas in the branches of law it is known as either *dayn* or *ḍamān*. The term *dayn* meaning what fall due on the *dhimmah* of a person as an outcome of a contract or otherwise³¹, is very close to *mūjib*. The same is with the term *ḍamān* which has been employed to denote the obligation to provide restitution. In short, it can be seen that liabilities are numerous whether arising from contract or any civil wrong as well as other sources of obligations.³²

²⁶Lexicon, vol.II, p.2922.

²⁷Mūjabāt, p.25.

²⁸Qawā‘id Ahkām, vol.II, p.141; Maj.‘Adliyyah, art.101.

²⁹Wajiz, vol.II, p.205.

³⁰Maj.‘Adliyyah, art.44.

³¹Maj.‘Adliyyah, art.158.

³²Mūjabāt, vol.I, pp.28-31.

Generally, *ḍamān* in Islamic law can be defined as the civil liability (*mas'ūliyyah madaniyyah*) in the widest meaning, whether arising from the non-performance of contract or from tort or negligence.³³

1.2 Ḍamān in the Qur'ān.

The term *ḍamān* does not occur in the Qur'ān at all. However, there are various instances in the Qur'ān where different other words have been employed bearing similar meanings and connotations to that of *ḍamān*. The Qur'ān used words like *kafālah*, *za'āmah* and *qabālah* which are treated as synonymous or as a substitute for *ḍamān*. Some scholars have tried to search for other authorities on *ḍamān* using the notion of fiduciary relationship (*amānah*), retribution (*jazā'*), sanctity of contract (*ḥurmat al-'aqd*) and others.³⁴ For example, al-Ṭabarī opined that the word *za'īm* occurring in surah Yūsuf verse 72 which reads: "For him who produces it, is (the reward) of a camel load; I will be responsible for it", is an evidence for the legality of *ḍamān*.³⁵

On the other hand, al-Qurṭubī said that verse 66 of surah 12 is the basis for the legality of *ḍamān* as it involves security based on personal guarantee. The

³³Editors, "Ḍamān" *EI*(2), vol.II, p.105.

³⁴Detailed surveys have been carried out by 'Alī al-Khafīf in his *al-Ḍamān fī 'l-Fiqh al-Islāmī* and Wahbah al-Zuhaylī in *Nazariyat al-Ḍamān*, the two modern literatures on the subject. These two works have a clear influence on the contemporary research on *ḍamān*, among others a recent work by Sulayman Muḥammad Aḥmad entitled *Ḍamān al-Mutlifāt fī 'l-Fiqh al-Islāmī* (1985), originally a doctoral thesis submitted at al-Azhar University, Cairo.

³⁵Al-Ṭabarī, *Jāmi' al-Bayān 'an āyī 'l-Qur'ān*, vol.XII, p.20.

implication of this verse represents such a notion when the Prophet Jacob demanded security for the safety of Yūsuf from his other sons :

"Jacob said : Never will I send him with you until ye swear a solemn oath to me, in God's name, that you will be sure to bring him back to me."

There is another verse which uses the term *qabālah* which connotes the concept of *ḍamān*. The verse reads : "Or thou bring God and Angel before us, face to face".³⁶ In his Tafsīr al-Kashshāf, al-Zamakhshārī elucidates that the word *qabīla* occurring in this verse could be construed as *kafīla* that is a surety of what is said and as witness of its reliability and authenticity.³⁷ Al-Kāsānī, author of the well-known Ḥanafī text, *Badā'i' al-Ṣanā'i'* also supported the same opinion. This verse however, according to him, is not an authority for the legality of *kafālah* but just to indicate the word *qabīl* has an element of *kafīl* in it.³⁸

The word *mas'ūl* occurred in various places in the Qur'ān. Normally the term will connote the notion of a person's liability upon perpetrating any action that attracts censure. For instance, the Qur'ān has ruled a principle which reads: "Detain them for they are answerable (*mas'ūlūn*)".³⁹ The same expression has also been used to demonstrate an undertaking imposed on a person who has entered into a valid contract by virtue of a Qur'ānic injunction : "O ye who believe, fulfill your undertakings for you are accountable and liable therefore".⁴⁰

³⁶Al-Qurtūbī, *al-Jāmi' li Ahkām al-Qur'ān*, vol.X, p.331.

³⁷Al-Zamakhshārī, *al-Kashshāf 'an Ḥaqā'iq Ghawāmiḍ al-Tanzīl wa 'Uyūn al-Aqāwil fī Wujūh al-Ta'wīl*, p.507.

³⁸*Badā'i' i'*, vol.VI, pp.2-3.

³⁹Q, al-Ṣāffāt (37):24.

⁴⁰Q., al-Mā'idah (5):1.

The ambit of general liability of an individual for all his deeds has also been endorsed by the Qurʾān in another verse: “Surely the hearing, sight, heart - all those (you) shall be questioned”. This is an evidence that the liability of an individual for whatever actions he did, is well recognized by Islamic teachings.⁴¹

Both ‘Alī al-Khafīf and Wahbah al-Zuḥaylī in their modern treatment on *ḍamān*, have quoted verses on retribution (*jazāʾ*) in support for the legality of its application. In this regard, they quoted a Qurʾānic provision which reads : “If you punish, let your punishment be proportionate to the wrong that has been inflicted on you. But if you have forbearance, it is certainly more honourable for those who have forbearance”.⁴²

Verses concentrating on trust (*amānah*) have also become a centre of discussion as they carry a strong foundation for *ḍamān* to be applied. As *amānah* represents the core concept in any legal relationship, and diversion from the trust will attract *ḍamān* to step in for remedy, reference to it is appropriate. Furthermore, the verse make a clear reference to justice in any process of adjudication (*taḥkīm*), which is a landmark in the application of *ḍamān*. The verse specifically cited on this subject is : “God commands you to hand back your trusts to their rightful owners and whenever you judge among men, pass your judgement with justice”.⁴³

⁴¹ Dr. Jamāl al-Dīn Muḥammad Maḥmūd, "Compensation for Damages and its Element in the Islamic Sharīʿah in Contractual Liability", *International Bar Association Proceeding*, 1985, p.34.

⁴² Q., al-Naḥl (16):126

⁴³ Q., al-Nisāʾ(4):58.

It is self-evident that from the above discussion that fulfilling responsibilities is an incumbent duty for all in their different capacities. From a legal point of view, the duty to supervise the smooth operation of law and order is for the authorities who are appointed to hold the *amānāt*.⁴⁴ This will not, at any rate, deny the role of the individual in pursuing fair and ethical trading and avoiding or minimising, as far as possible, any dispute between them. This could be the reason why ‘Umar bin al-Khaṭṭāb used to require that all prospective traders in the Madīnah markets should equip themselves with sufficient knowledge of commercial laws (*aḥkām al-mu‘āmalāt*) so that they would appreciate the pursuit of trust and justice better.

Muṣṭafā al-Zarqāʾ, in his work entitled *al-Fiʿl al-Ḍār*, has recounted a number of Qurʾānic verses on a variety of themes, all associated with wrongful action which necessitate *ḍamān*. Firstly, he speaks on the prohibition of violation against property quoting the verse which reads: “ O you who believe, eat not up your property among yourself in vanities, but let there be amongst you traffic and trade by mutual good will..”.⁴⁵ Secondly, he highlighted the strong denunciation by the Qurʾān of inflicting mischief (*fasād*) in society. He quoted the injunction which

⁴⁴That is why it is quite important, in the later part of this work, to analyse the structured institutionalised efforts towards enforcement of *ḍamān*. As a noble achievement of Islamic civilization, institutions like *ḥisbah* deserves a comprehensive study as there is a close link between its operation and the notion of redress, restitution and protection of rights inherent in *ḍamān*. See Ibn Taimiyyah, *al-Ḥisbah fī ʿl-Islām*, Maktabah al-Nahḍah, Cairo, 1976. Also see *Maʿālim* .

⁴⁵*Q.*, al-Nisāʾ(4):29. See also al-Baqarah(2):188.

reads: Do not spread mischief on the earth after it hath been set in order...”.⁴⁶ Clearly, Zarqā’ has conveyed that the Qur’ān has unequivocally prohibited both violation against property and mischievous deeds. As such, the wrongdoing will be severely punished both in the world and in the hereafter, to protect mankind from injustices and transgression. This standpoint has the backing of ‘Izz al-Dīn ‘Abd al-Salām who said:

“Among the evidences which encompass the prohibition of *ifsād* is the Qur’anic verse “Do not do any mischief on earth after it has been reformed” and the verse “Verily God dislikes mischievous deeds” and the verse “And we would increase the suffering [of the penalty] as a result of the mischief they committed”. And also the verse “That is the abode in the hereafter We build for those who were not arrogant nor did they commit any mischief on earth” and the verse “Whosoever did a wrongful act will be punished [accordingly]”, as well as a more general prescription “And anyone who has done an atom’s weight of evil, shall see it”.⁴⁷

As a conclusion, it can be said that the occurrence of the word *kafālah* on numerous occasions in the Qur’ān is not a conclusive proof of the legality of *damān* in the Qur’ān. Although it was mentioned a few times like: “He (Zakariyya) took care (as a surety) of her (Maryam)”⁴⁸ and in another verse: “You must not be present when they cast their pens (to see) which of them should have charge of Maryam”⁴⁹ and “Do not break your oath after you sworn it, for (by

⁴⁶Q., al-A‘rāf(7):56. He also quoted al-Baqarah(2):205 which reads: “When he turns his back, his aim everywhere is to spread mischief through the earth and destroy crops and cattle, but Allāh loveth not mischief.” See *Fi’l Dār*, pp.18-19. Reference was also made to the story of Prophets Dāwūd (David) and Sulaymān (Solomon) in al-Anbiyā’ (21):78 “And remember David and Solomon, when they give judgement in the matter of the field into which the sheep of certain people had strayed by night, We did witness their judgement.” In his analysis, Zarqā’ speaks about his conclusion from this case, that the must be a balance (*ta‘ādul*) between the injury and the compensation. See *Fi’l Dār*, pp.20-21.

⁴⁷*Qawā‘id Ahkām*, p.157.

⁴⁸Q., Āl ‘Imrān (3):37

⁴⁹Q., Āl ‘Imrān (3):44

swearing in His name) you make God your surety”⁵⁰, it is more applicable to the notion of guardianship rather than strictly a guarantee for commercial dealings. Hence, the proof on the legality of *ḍamān* can be found in other Qur’ānic injunctions, through some other concept consonant to its very nature. After all, *ḍamān* is not only confined to *kafālah* in its strictest sense but has been utilized in Islamic jurisprudence as a basis for restitution in any unjust commercial dealings, protections in markets and among professional artisans and so on.

1.3 Ḍamān in the Sunnah

The subject of *ḍamān* has been treated quite extensively in the sunnah of the Prophet, being the detailed explanation and practical elucidation of the Qur’ānic general rules. In this respect, the sunnah in its three forms - *aqwāl* (sayings), *a‘māl* (deeds) and *taqrīrāt* (tacit approvals)- has provided ample evidence for the legality of *ḍamān*.

Unlike in the case of the Qur’ānic provisions where the term *ḍamān* has never occurred at all, this term has been used in various traditions of the Prophet along with other synonymous terms like *kafālah*, *za‘āmah*, *qabālah*, *ḥamālah* or the like. As far as the ḥadīth collections are concerned, the subject of *ḍamān* is placed under various headings, depending on the issue involved. It has been placed, among others, under *kitāb al-kafālah* (book of guarantee), *kitāb al-bay‘* (book of sale), *kitāb al-qarḍ* (book of loan), *kitāb al-muḍārabah* (book of dormant

⁵⁰Q., al-Naḥl (16):91

partnership) and so on. As *ḍamān* also relates to settlement of disputes and paying restitution, it was also discussed under *kitāb al-aqḍiyah* (book of adjudication) and even under *kitāb al-aiman* (book of oaths).⁵¹

The *Muwatta'* of Mālik b. Anas is an important example as it has recounted in various places the way that *ḍamān* is administered. It has been reported that:

“Mālik said : concerning a man who gave another man a property on dormant partnership (*qirāḍ*) so that he can make enterprise using it. Whatever that he sells from the debt (*dayn*), he is responsible and thus liable therefor. This is incumbent upon him if he so sells whatever property he has taken [on that basis] and he is responsible for it”.

“And in another occasion Mālik said : if any person undertakes a deposit from a depositor [in a *wadī'ah* contract] and trades them for himself and gained profit out of it, the profit is absolutely his in return for the responsibility he is bearing for the [safety] of the property until it is returned to the owner”.⁵²

In one ḥadīth, the Prophet was reported to have ruled that: “A surety (*za'im*) holds liability (*ghārim*)”.⁵³ This ḥadīth has been quoted by the jurists as a proof of the status of *ḍamān* as a gratuitous contract (*'aqd tabarru'*), as the surety is willing to become legally responsible without any pecuniary consideration (*'iwad*). Therefore, the underlaying notion suggested in the ḥadīth is liability (*ghurm*) but not profit or advantage (*ghunm*).⁵⁴

⁵¹See A.J.Wensinck, *Concordance et Indices de la tradition Musulmane*, Leiden : E.J.Brill, 1965.

⁵²Al-Suyūṭī, *Tanwīr al-Ḥawālik Sharḥ Muwaṭṭa' Imām Mālik*, 1951, vol.II, pp.742-748. See also, Farhat J.Ziadeh, "al-Muwaṭṭa' as a Source of Social and Economic History of the Ḥijāz," *IS*, 18 (1979), pp.299-309.

⁵³Abū 'Abdullāh Muḥammad b. Yazīd al-Qazwaynī, *Sunan Ibn Mājah* [Kitāb al-Kafālah], Ḥadīth no.2405, 1952.

⁵⁴*Kafālah*, 1986, p.31.

During the Day of Sacrifice in Mina, the Prophet is reported to have said :

“Indeed, your blood, property and honour are sacrosanct and inviolable similar to the sacrosanctity and inviolability of this day, this month and this land...”⁵⁵

The fact that the notion of sacrosanctity of property (*ḥurmat al-māl*) is treated on the same footing as that of human life is a clear proof that any destruction or causing any loss to the property will give rise to payment of restitution.

In another report, the Prophet did not offer his special prayer (*ṣalāt al-janāzah*) for a dead man who left behind an unpaid debt. When the body of the man was brought in, the Prophet asked : “Has he any debt?”, the people replied, “Yes, two dinārs”. The Prophet said, “Therefore say the special funeral prayer for your friend”. Abū Qatādah then remarked: “O Messenger of God. I take the responsibility for paying the two dinārs”. Then, the Prophet prayed for the dead man. Afterward, the Prophet made a statement :

“I am closer to every believer than his own self. So if a true believer dies and leaves behind some debt unpaid, I am responsible [as surety for him] and if he leaves behind some property, it will be for his legal heirs.”⁵⁶

⁵⁵Ibn Ḥajar al-‘Asqalānī, *Bulāgh al-Marām ma‘a Sharḥihi Subul al-Salām*, Cairo, 1955, vol.III, p.73.

⁵⁶According to Ibn Ḥajar al-‘Asqalānī, Ibn Baṭṭāl said : The Prophetic saying " I will be surety for his debt" has abrogated his decision not to perform the funeral prayers. Repayment of the debt is drawn for the state treasury (*bayt al-māl*) from the allocation for *al-ghārimīn* (those who are in debt and in genuine difficulty and have satisfied the conditions to receive assistance from the state). This is construed from his statement [*fa ‘alayyā qadā’uh*]. This decision has set a precedent later followed by Muslim Heads of state when confronted with such a problem. See Ibn Ḥajar al-‘Asqalānī, *Fath al-Bārī*, vol.IV, p.478 ; al-Shawkānī, *Nayl al-Awṭār*, vol.V, p.357 ; al-Ṣan‘ānī, *al-Muṣannaf*, vol.VIII, p.290. See also *Badā’i’*, vol.VI, p.206; *Kafālah*, p.41.

There is also a ḥadīth dealing with actual occurrence of incidents in which *damān* was applied as remedy. On one occasion, it was reported on the authority of Anas that the Prophet was with some of his wives when he received a servant carrying a wooden container full of food from another wife. One of the wives took the container and unfortunately broke it. The Prophet asked them to eat the food and at the same time held the container until the gathering adjourned. Finally, the Prophet returned a sound container to the donor and kept the broken one.⁵⁷

In a case involving an apparent transgression (*ta'addī*) wherein a camel owned by al-Barrā' b. 'Āzib had trespassed into someone's garden causing certain damages in it, the Prophet ruled that: "The owner of the land has to take due care of his land during daytime but if there is destruction caused by animals at night will be the responsibility of the animal's owner".⁵⁸ In respect of the safety at public places, the Prophet was reported to have said: "Whoever stationed their riding animal at the public roads or at marketplaces and it caused destruction, he shall be liable".⁵⁹

There are also reports of Prophetic sayings not directly dealing with the subject of *damān* but on a rather wider and more universal platform. Normally, these come under the subject of ordinary liability. A celebrated ḥadīth on the matter points out that: "A man is responsible for whatever he has taken into possession [in

⁵⁷Ibn Ḥajar al-ʿAsqalānī, *Fatḥ al-Bārī*, vol.VI, pp.49-50. Cf. Ibn Mājah, *Sunan Ibn Mājah*, vol.II, p.782.

⁵⁸*Muwaṭṭaʿ*, vol.II, p.747. Also see al-Shāfiʿī, *Ikhtilāf al-Ḥadīth* [on the margin of al-Umm], vol.II, p.400.

⁵⁹Ibn Taimiyah, *Muntaqā al-Akḥbār min Aḥādīth Sayyid al-Akhyār*, vol.II, pp.342-343.

his hands] until he dispenses his supposed obligation”.⁶⁰ The concept of sanctity of ownership (*ḥurmat al-milk*) is also said to be a premise for *ḍamān* in which the Prophet said: “No one may appropriate the property of his fellow, either with intention or deceitfully. Should he have taken the walking stick of his fellow, he is bound to return it”.⁶¹

Among the strongest justification for application of *ḍamān* found in the ḥadīth is based on the notion of protection of the society from injury (*ḍarar*). The specific ḥadīth on the subject reads: “There shall be no injuring [of one man by another], in the first instance nor in requital”.⁶² This ḥadīth conveyed a message that public interest must be safeguarded. It is also important to note that inflicting an injury is completely prohibited as it is contrary to the concept of justice and peace. However, had an unwanted injury been inflicted, the victim can turn to the appropriate authorities where proper action will be taken. In this realm, *ḍamān* will play an important role as a kind of popular redress to such injury.

“This maxim has been the bedrock for various topics of *fiqh*. Among others, returning the merchandise on count of defect (*al-radd bi 'l-ʿayb*), all types of rights of option (*khiyārāt*), all types of interdiction (*ḥajr*), and right of pre-emption (*shuʿfah*) which must be given to a person sharing the border of the [adjoining] property. This also applies to the neighbour to prevent the mischief of a bad neighbour as a result of his building a higher or lower storey [that bring about mischief to his neighbour]. This is also true in the case of *qisās*, *ḥudūd*, *kaffārāt* and *ḍamān al-mutlifāt* and ordering for *qis-mah*. It has also been the basis for appointment of political and judicial authorities, preventing bloodshed and fighting against the polytheists and rebels.”⁶³

⁶⁰ Al-Zaylaʿī, *Naṣb al-Rāyah li Aḥādīth al-Hidāyah*, vol.IV, p.167. Also see Ibn Mājah, *Sunan Ibn Mājah*, vol.II, p.802.

⁶¹ Al-Zaylaʿī, *Naṣb al-Rāyah*, vol.IV, p.167-168.

⁶² Al-Shawkānī, *Nayl al-Awṣār*, vol.V, pp.219-221.

⁶³ *Ashbāh.N*, p.85.

There are also a number of ḥadīth of the Prophet touching on the subject of fair trading and condemnation of any fraudulent misrepresentation in business dealings. Abū Hurayrah reported the Messenger of God saying: “He who bought a sheep with its udder tied up [as to show high yield of milk and induces sale] could hold it [for certain time] and milk it. If he satisfied, the sale is concluded, otherwise he could return it alongwith a cubic measure (ṣāʿ) of date”.⁶⁴ The dates are considered as a kind of compensation for the milk consumed by the buyer while keeping the animal. According to Abū Ḥanīfah, the price of milk could be paid, as the restitution is not necessarily to be in the form of dates.⁶⁵

In lease of lands (*kirāʾ al-arḍ*) or other related transaction like share-cropping (*muzāraʿah*) and planting of trees (*musāqāt*), there are a set of guiding rules provided by the Prophet as regards the amelioration of the situation in such agricultural ventures which are affected by natural calamities (*jawāʾih*). Jābir b. ʿAbdullāh is reported that the Prophet said: “If you sell fruits to your fellow and such are stricken by calamity, you are not allowed to gain any [monetary] gain from him, as that is unjustifiable”.⁶⁶

By the same token, there are also provisions for protecting the right of creditors if the debtors become insolvent. The Prophet was reported to have said that:

⁶⁴al-Nisābūrī, *Ṣaḥīḥ al-Muslim*, vol.II, p.1155.

⁶⁵See discussion in *Mughnī*, vol.IV, p.237. Also see Ibn Rushd, *Bidāyat al-Mujtahid*, vol.II, p.272.

⁶⁶Al-Suyūṭī, *Ṣaḥīḥ Muslim bi Sharḥ al-Nawawī*, vol.X, pp.215-219.

“Whenever a man sells wares and then the purchaser becomes bankrupt and the vendor has not taken any of the price and he finds some of his property intact with the purchaser, he is more entitled to it than anyone else. If the purchaser dies, then the vendor is the same as other creditors with respect to it”.⁶⁷

1.4 Scope of Ḍamān

Based on the definitions dealt with earlier, it appears that the jurists have applied this concept in two senses, the general (*‘āmm*) and particular (*khāṣṣ*). In the general expression, *ḍamān* is perceived as an obligation to provide indemnity and reparation (*ghurm*). Whereas, in the particular sense, *ḍamān* is accepted as the holding of the guarantor’s responsibility (*dhimmah*) in respect of rights (*ḥuqūq*). Therefore, despite the fact that *ḍamān* has been overwhelmingly applied in the sense of suretyship (*kafālah*), it equally signifies the notion of redress to any contractual imperfections.⁶⁸

Such perceptions have resulted in the formulations of a pattern of topical treatment of these matters in fiqh literature. Sometimes there is a special chapter on *ḍamān* which include discussion of *kafālah*, whereas other writers have included *ḍamān* under their chapter on *kafālah*. The former approach marks a departure from the classical approach represented by the latter. By this transition, *kafālah* is treated as a sub-topic of *ḍamān*. It also represents the merging of the two concepts, interchangeably used in the past, by systemization of the terminologies and its pop-

⁶⁷Ibid., pp.221-223. See also Aishah Abdurrahman Bewley [tr.], *al-Muwaṭṭa’ of Imam Mālik*, p.276.

⁶⁸*Madhāhib*, vol.IV, p.34.

ularisation. Such will allow a better and fuller understanding of the role of *ḍamān* in Islamic law, particularly in trade and commerce.⁶⁹

There are some definitions underlining the notion of compensation (*gharāmah*), like the one by al-Ḥimawī who said that *ḍamān* is a concept consisting of an undertaking to return the equivalent property in lieu of the one being damaged if it is fungible (*mithlī*) or the value if it is non-fungibles (*qimī*).⁷⁰ The *Majallat al-Aḥkām al-ʿAdliyyah* provides that *ḍamān* is to render [to the wronged party] the equivalent for fungibles and the value for non-fungibles.⁷¹ Al-Ghazālī's definition pointed out that *ḍamān* is the onus to return a property or to substitute it with something similar or the equivalent monetary value.⁷² The definition put forward by al-Shawkānī speaks about the purpose of *ḍamān* as the effective cause for payment of compensation for violation of rights in respect of property.⁷³

As far as application of *ḍamān* in transactions based on *muʿāmalāt sharʿiyyah*, both general and particular senses of *ḍamān* will become relevant. However, it will depend on the nature of each transaction executed. In certain respect, the plain suretyship will be the general premise. For instance, a person giving a personal guarantee for performance of certain obligation like repayment of a loan. On the other hand, *ḍamān* is applied on the premise of mundane contractual liability, giving rise to duties that have to be undertaken.

⁶⁹ *Ashbāh.S.*, pp.360-362.

⁷⁰ Al-Ḥamawī, *Ghamz al-ʿUyūn*, vol.II, p.210.

⁷¹ Article 416 reads : [*al-ḍamān huwā iʿṭāʾ mithl al-shayʾ in kānā min al-mithliyyāt wa qīmatihī in kānā min al-qīmiyyāt*]. See *Sh.Bāz*, vol.I, p.235.

⁷² *Wajīz*, vol.I, p.205.

⁷³ Al-Shawkānī, *Nayl al-Awṭār*, vol.II, p.234.

These definitions clearly demonstrated the significance of reparation for any civil wrong particularly in the realm of destruction of property (*ḍamān al-mutlifāt*). It has been recognised as one of the most important aspects of civil matters (*aḥkām madaniyyah*). However, this does not rule out the viability of *ḍamān* on a wider theme like protection of rights and inculcation of fair trading inherent in the redress it seeks to achieve. Al-Ghazālī's view is the closest to this notion as he emphasized the idea of securing people's rights on a universal basis rather than exclusively pertaining compensations for torts.⁷⁴

If analysed from the mode of expression (*ta'bīr*) used by the jurists, these basic differences can be noticed. Some of them used phrases like *ḍamān al-itlāf* (compensation for destruction), *ḍamān al-ghaṣb* (compensation for wrongful appropriation), *ḍamān al-nuqṣān* (compensation for diminished value), *ḍamān al-ma'mūr* (compensation of an employer) and the like, each of which signifies the reasons for compensation. Some other jurists, on the other hand, used terms like *taḍmīn* and *taghrīm* representing a general sense of responsibility. *Taḍmīn* means "to be made answerable" and *taghrīm* means "to be made to pay".⁷⁵ Based on this, it is suggested that *ḍamān* is civil liability by which the interests of the rightful parties are being protected, a pertinent element in commercial activities.⁷⁶

1.5 Grounds of Ḍamān

⁷⁴Wajīz, vol.II, p. 205.

⁷⁵Lexicon, p.1805.

⁷⁶For details see *Majma'*, p.150 and *Taḍmīn*, pp.12-23.

Sabab [pl. *asbāb*] literally means cause or medium that will lead to an intended destination. Thus, rope (*ḥabl*) and road (*tarīq*) are associated with *sabab* as they can become a reason for the attainment of a certain goal. Technically, *sabab* is that by which the existence of the effect (*musabbab*) is necessitated. The uṣūlī perceived *sabab* as the determining factor for the existence of a *ḥukm* or otherwise.⁷⁷

Sabab differs from that of *rukṇ* (basic constituent) in the sense that *rukṇ* is the essential element of a being. *Sabab* is an external element which is not part of the *māhiyah* (quiddity) of it. To sense the difference, it can be seen that *sabab* has always been attached to legal value (*ḥukm*) that it has given rise to. For instance, the expression of *ḍamān al-‘aqd* is an illustration that the liability is established on the validity of a contract or simply caused by it. On the same basis, *ḍamān* has been associated with a number of grounds such as liability caused by destruction (*ḍamān al-itlāf*), liability resulting from a pledge (*ḍamān al-rahn*) and the like.⁷⁸

Ibn Rajab opined that there are three grounds of *ḍamān*, namely *‘aqd* (contract), *yadd* (possession) and *itlāf* (destruction). Apart from that, he added two other grounds which are exclusive to certain circumstances, namely *ḥaylūlah* (blockade) and *ghurūr* (deception).⁷⁹ Al-Suyūṭī mentioned four grounds comprising that of contract, possession, destruction and blockade.⁸⁰ On the other hand, Ibn

⁷⁷ Abū al-Nūr Zuhayr, *Uṣūl al-Fiqh*, pp.118-119 cited in *Mutlifāt*, p.41.

⁷⁸ *Mutlifāt*, p.41.

⁷⁹ *Qawā‘id*, p.145.

⁸⁰ *Ashbāh.S.*, p.362.

Rushd ruled that among other causes for *ḍamān* is direct destruction (*mubāsharah*) or by causal destruction (*al-mubāsharah li sabab al-mutlaf*) or by the commonest ground, the established possession (*ithbāt al-yadd*).⁸¹

Al-Ghazālī⁸² together with scholars of Shī'ah Imāmiyah⁸³ and al-Qurafī⁸⁴ are of the opinion that the grounds for *ḍamān* are practically actuating a transgression, creating a cause of destruction and unauthorised possession (*waḍ' al-yadd allafī laysat bi mu'taminah*). It can therefore be summarised that there are at least five important grounds of *ḍamān* which include contract, possession, destruction, blockade and deception.

a] Contract (*'aqd*)

Contract (*'aqd*) literally means tie or bond. Technically, a contract is the obligation of the contracting parties on a certain matter after offer (*ījāb*) and acceptance (*qabūl*) is communicated and concluded. On this ground, contract is the volition of the contracting parties aiming at creating a legal relationship in form of obligations that must be honoured by them.⁸⁵

Al-Suyūfī said that certain assurances guaranteed by the contract were absolute, regardless whether there has been a specific provision on it or not. For

⁸¹Ibn Rushd, *Bidāyat al-Mujtahid*, vol.II, p.211.

⁸²Wajīz, vol.II, p.205.

⁸³M.Jawād al-Ḥusaynī, *Miftāḥ al-Karāmah*, vol.VI, pp.330-331 cited in *Mutlifāt*, p.43.

⁸⁴Al-Qurafī, *al-Furūq*, vol.II, p.206-208.

⁸⁵Maj. 'Adliyyah, arts.103-104; *Mujabāt*, pp.264-265; *Commercial*, pp.7-10.

instance, in a contract of sale, the obligations for delivery of the commodity and paying the price is an integral part of the deal. Similarly, remedies for defect, misrepresentation, fraud and such other matters are available so that an automatic protection is granted. If it is a loan agreement and the debtor fails to repay his debt, the basic concept of the inviolability of a contract necessitated *ḍamān* to be applied to remedy the matter.⁸⁶

On the contrary, Wahbah al-Zuhaylī maintained that the standing of contract as a source of obligation is dependent upon the express terms and conditions attached to it or sanctioned by custom and usage (*‘urf wa ‘ādah*).⁸⁷ The basis for such obligation is founded on the basis of a Qur’ānic provision: “O you who believe, fulfill your undertaking”. This prescription is strengthened by a ḥadīth: “Muslims are bound by their undertakings except when they legitimise the unlawful and prohibited the lawful”. A legal maxim further affirmed that the terms of the contract must be observed as far as humanly possible. Those who breach the terms and conditions of the contract or neglect the performance as agreed will become liable.⁸⁸

To allow some flexibility, the role of custom is strongly upheld in Islamic jurisprudence provided it does not contradict the basic precepts of the *Sharī‘ah*. This is true in the case of terms and conditions of contract which will be the bedrock of *ḍamān*. A maxim rules that determination by custom is on the same

⁸⁶*Maṣādir*, vol.I., pp.5-12.

⁸⁷*Naḡ.Ḍamān*, pp.5-8.

⁸⁸*Ibid*.

standing as determination by text (*naṣṣ*).⁸⁹ Similarly, the customs of the merchant are regulations among them.⁹⁰ The role of custom is crucial for the systemization of the application of *ḍamān* in light of the general Qur'ānic provisions.⁹¹

In treating the subject of *ḍamān*, contract is divided into three classes. This classification is based on certain parameter associated with the nature, purpose and distinct characteristic of each contract. The three division is: [a] '*Aqd Ḍamān* : a transaction involving transfer of property and *ḍamān* is an accompanying legal consequence arising therefrom ; [b] '*Aqd Amānah*: a contract in which property is held on trust. It will not give rise to liability except when transgression (*i'tidā'*) and negligence (*taqṣīr*) can be established; and [c] '*Aqd Muzdawaj al-Athar* : transaction involving both *ḍamān* and *amānah* and thus bringing about a mixed effect.⁹²

b] Possession (*wad' al-yadd*)

Possession can either be on the basis of trust or otherwise. The possession based on trust is called *yadd al-mu'taminah* . In such situation, the trustee holds the property in his custody (*ḥiyāzah*) as he will be responsible for its safety and well-being. Such possession usually emanate from a legal authorization (*wilāyah shar'iyyah*). The entrusted hands as they are known or simply the trustees are like the position of the depository in *wadī'ah*, the entrepreneur in *muḍārabah* or the

⁸⁹*Maj. 'Adliyyah*, art.45. See also *Sh.Bāz*, vol.I, p.38.

⁹⁰*Maj. 'Adliyyah*, art.44.

⁹¹Farhat Ziadeh, " 'Urf (Custom) and Law in Islām," in *The World of Islām* edited by J.Kritzeck and R.B.Winder, pp.60-67.

⁹²*Madkhal*, vol.II, pp.121-128; *Naz.Ḍamān*, pp.144-173.

artisan in *istiṣnāʿ*. They are not liable for *ḍamān* as their possession of the property is hounoured with the trust unless violation of the trust in any conceivable manner can be established.⁹³ Such practice is approved by a ḥadīth which reads : "The hands [holding the trust] are held liable until all the supposed duties have been carried out".⁹⁴

On the contrary, the concept on unentrusted possession (*yadd ghayr al-muʿtaminah*) is the situation wherein a person takes possession of a property a result of a transgression (*ʿādiyyah*). It can be in form of theft⁹⁵ or usurpation (*ghaṣb*). This subject does not come under this present work as it falls strictly under criminal law and also law of tort. Despite that, there is a situation in commercial activities which falls in this category. It is a kind of unentrusted possession without the element of transgression (*ghayr ʿādiyyah*) but rather circumstantial. The illustration : a concluded contract of sale will result in the buyer possessing the goods and being responsible therefor. He is neither on trust nor committing any transgression.⁹⁶

Ibn Rajab viewed the question of *wadʿ al-yadd* in relation to unauthorised disposition of property. Firstly, one may gain control of the property (*istīlāʿ*) leading to immediate ownership. In such case *ḍamān* is exempted like the acquisition of the spoils of war. Secondly, the possession without transfer of ownership and thereby does not inviting *ḍamān* at all. This is true in the case of possession for

⁹³ *Mutlifāt*, pp.45-48.

⁹⁴ Abū Dāwūd, *Sunan Abū Dāwūd*, vol.II, p.146.

⁹⁵ Theft is defined as : taking someone else's property by stealth. See *Badāʿiʿ*, vol.II, p.65 ; Ibn Humam, *Sharḥ Faḥ al-Qadīr*, vol.IV, p.218 ; *Mughnī*, vol.IX, p.104.

⁹⁶ Al-Qurāfi, *Kitāb al-Furāq*, vol.II, p.207.

certain purpose and the property is returnable when the intended objective has been accomplished. The example cited is the case of *wadī'ah* as basically no *ḍamān* is arising. This rule also applies to the case of lost property (*luqāṭah*). Thirdly, the possession resulting from a violation of right like theft, usurpation and the like.⁹⁷

Having analysed various types of possession classified by the jurists, it can be concluded that possession is not the only determining factor for *ḍamān*. Possession can either be on fiduciary relationship wherein liability is waived or based on a possession with an inherent liability to be shouldered. The concept of designated possession emanating from a legal authorisation (*wilāyat shar'īyyah*) does not inculcate benefits to the designated person *per se*. This is the reason of not burdening him with liability.⁹⁸ The *Sharī'ah* ruled that the designated possessor is a trustee whose trustworthiness is recognized by law. In the event of damage of the property concerned, he is not liable for *ḍamān* as his position is honoured. This will change when it is proven that he has acted in violation of the trust (*ta'addī*) or he has neglected due care in taking charge of the property such as failure to keep to maintain the normal standard of care and caution.

As an illustration to show the shift from the state of trust (*amānah*) to liability (*ḍamānah*), the case of *wadī'ah* is examined. The grounds for the change of the status in the contract of safekeeping is when the depository is found guilty of negligence (*taqṣīr*), neglect (*tafrīt*) or any forms of violation (*i'tidā'*). This can be

⁹⁷*Qawā'id*, pp.220-221. Also see *Mutlifāt*, pp.54-55.

⁹⁸*Ḍamān*, p.103. Among other examples cited by the jurists to explain this concept are possession in the case of the contract of deposit (*wadī'ah*), contract of agency (*wakālah*), contract of partnership (*sharikah*) and so on.

in the form of passing the task of safekeeping to another person, the deposited property being used without permission or when it is permitted, it was used excessively or abnormally.⁹⁹ Al-Shāfiʿī has a stricter rule that if the safekeeping is destined towards taking advantage from the deposit and it causes damage, the depository is liable because he has taken the task with a predetermined motive to violate the trust.¹⁰⁰ Liability, in *yadd al-ḍamān* has always been associated with transgression, legal authorization, the possessor's commitment to undertake responsibilities and the possession is contemplated for his sole benefit.

The case of unauthorised transaction is known as the disposition by a *fuḍūlī*. It signifies a transaction executed by a person, who deals with the property of another without legal permission. The celebrated maxim of Islamic law reads: "No person may deal with the property of another unless by his permission or acting as his trustee".¹⁰¹ Agency and other forms of delegation entail legal permission to the agent to manage the affairs on the owner's behalf, to the extent of the permission. If the agent goes beyond the limit, he is a *fuḍūlī*. Muslim jurists are not in agreement on the validity of the transaction executed by the unauthorised agent. al-Shāfiʿī hold that such practice is void *ab initio*, despite being later ratified by the owner.¹⁰²

The majority of jurists, including Abu Ḥanīfah and Mālik, have taken a different view. To them, the validity of a transaction by a *fuḍūlī* is dependent upon

⁹⁹*Qawāʿid*, p.38.

¹⁰⁰*M. Muḥtāj*, vol.III, p.89.

¹⁰¹*Maj. ʿAdliyyah*, art.112.

¹⁰²*Umm*, vol.III, p.13.

ratification by the owner of the property. It was argued that, subsequent ratification has the same effect as a previous authorisation to act as an agent. There is a third view, which has been adopted by the modern codes in which a *fuḍūlī* transaction is validated though not ratified by the owner but not to his disadvantage.

c] Destruction (*itlāf*).

The term *itlāf* is derived from *t,l,f* carrying the meaning of damage and annihilation of something and the verb *atlafā* signifies that someone has taken an active part in the destruction. Technically, *itlāf* is attributed to any injurious act committed against properties of others in which the perpetrator will become liable. This concept is directly applied in the case of destruction of property and was later broadened by the jurists so as to include personal injury.¹⁰³ In this respect, *ḍamān al-itlāf* is sometime distinguished from *ḍamān al-mutlifāt* as the former is more general whereas the latter only pertains to property.¹⁰⁴

At a wider ambit, *itlāf* is seen as a type of transgression (*i'tidāʿ*), perceived as the forbidden act which give rise to liability of the person who committed it. The other type is the act of wrongful appropriation (*ghaṣb*), involving the unlawful appropriation of an usurper from the rightful owner. *Ghaṣb* is not directly relevant to the present research, but might still be useful in certain respects.¹⁰⁵ Al-Kāsānī

¹⁰³ Maḥmaṣṣānī, "Transaction in the Sharī'a," in *Law in the Middle East* edited Majid Khadduri and Herbert Liebesney, p.190.

¹⁰⁴ *Mutlifāt*, p.95.

¹⁰⁵ *Badāʿiʿ*, vol.VII, p.143. See also *Maj.ʿAdliyyah*, arts.881-911 [on wrongful appropriation] and arts.912-940 [on destruction].

maintains that restitution is more justified in the case of destruction compared to wrongful appropriation, as there has been the elements of transgression and injury. Thus, if restitution is granted in wrongful appropriation, it is more recommended in the case of destruction.¹⁰⁶

Al-Kāsānī further defined *itlāf* as the removal of something from its full normal utilities and benefits. This removal can be explained in two senses. First, when the destruction has been committed *in toto* (*ṣūratān wa maʿnan*) wherein both the object and its utility are destroyed. The second situation is when the destruction is only confined to the utility as the object remains intact. This is called partial destruction (*al-itlāf maʿnan*). *Damān* is awarded in both cases. However, for such award, the jurists require the presence of two main constituents of destruction, namely injurious act (*fiʿl ḍār*) and occurrence of the injury itself (*ḥudūth al-ḍarar*).¹⁰⁷

Injurious act is a deed that will bring about damaging consequences, whether being committed directly or indirectly, by commission or omission, by physical (*ḥissī*) or psychological (*naḥsī*). In a simpler expression, *ḍarar* simply means any form of harm (*adhā*) inflicted on another resulting in pecuniary loss, loss of utility, lowering of market value and so on. Other than *ḍarar*, terms like

¹⁰⁶*Badāʾiʿ*, vol.VII, p.165.

¹⁰⁷*Mutlifāt*, p.128.

istihlāk and *ifsād* are used.¹⁰⁸

d] Blockade (*ḥaylūlah*).

Ḥaylūlah is derived from rootword *ḥ,w,l* meaning blocking or obstructing. In the common sense of the Arabs, it was always expressed that “in between us is blocked by a river” explaining the person’s inability to attain something or reach a place because of the obstacle. The jurists have extended the literal sense of this concept to the technical legal usage. Therefore, if a person intervenes between an owner and his property by preventing access to it, benefitting from it or having complete power of disposition, this is known as *ḥaylūlah*. It is a ground of *ḍamān* which will make the intervener responsible for his action and he will have to pay restitution.¹⁰⁹

¹⁰⁸There are certain conditions for an injury to be established which merits *ḍamān*. [1] The act must be injurious, either in the sense of physical acts, words, behaviour and negligence; [2] The injury must be unlawful, injury resulting from a permissible act or from exercise of rights did not necessitate restitution; [3] The injury is a result of an aggression; [4] Ill intention can be proven; [5] It is committed by a competent person (*kāmil al-ahliyyah*). See *Mutlifāt*, p.208. As regards the theory of abuse of right, the maxim of Islamic law said: “An act endorsed by law cannot be made the subject of claim for compensation” [*Maj. Adliyyah*, art.91]. Some jurists however opined that if such an exercise caused an injury to others, it is prohibited by virtue of the prohibition of inflicting *ḍarar* in the textual authorities. Some scholars required an excessive injury (*ḍarar fāḥish*) to be the reason for taking away this privilege. See *Naz. Ḍamān*, pp.22-25. On the this question of abuse of right, cf. discussion at page 42 and 187, *infra*.

¹⁰⁹It is regarded as a kind of usurpation (*ghaṣb*). In *Murshid al-Ḥayrān*, Qadrī Bāshā explains the concept of *ḍamān al-ta’arruḍ* at article 651 reads : Whenever an obstruction is made during the period of the lease (*ijārah*) from gaining benefit from the leased property. For instance, usurpation of a house on lease and the usurper’s control over it could not be removed, the lessee is exempted from liability. If it is only for a certain period of time, the exemption is granted for that period. See *Wajīz*, vol.II, p.204; *Murshid*, p.178; *Maṣādir*, vol.VI, pp.138-145; *Mutlifāt*, pp.70-72.

The basis for the inclusion of *ḥaylūlah* as one of the grounds for award of *damān* is the ḥadīth on prohibition of inflicting injury or retaliating to an injury by another injury.¹¹⁰ It was argued that *ḥaylūlah* which causes a blockade between the property and its owner is a substantial injury. This is due to the fact that the owner is unable to profit from his property. Since the basic purpose of having property is to obtain the maximum utility and satisfaction from it, any blockade will cause a great deal of loss.¹¹¹

“*Ḥaylūlah* has been considered as a source of *damān* because it is a kind of unlawful aggression against property and is treated as tantamount to the legal standing of partial destruction (*al-itlāf ma‘nan*) as the utility of it has been impaired. The property, in relation to its owner, is just like a destroyed property, as it is not in his possession [for usage]..”¹¹²

If the possession is unlawful, the holder would be seen as a transgressor who is liable for holding the property. The *Mukhtaṣar* of Khalīl rules that: “A usurper becomes responsible for the object he detains as soon as he taken possession thereof, he is not entitled to avail himself of the defence of *force majeure* (supervening impossibility of performance)”.¹¹³

In such a situation, the wrongdoer is required to pay *damān*. If only minor destruction takes place and the property remains intact and returnable, he would be held responsible until the property is returned. As for the owner, he cannot claim restitution of similar property or payment of its value should he decided to demand return of the original property.

¹¹⁰Ibn Mājah, *Sunan*, vol.II, p.784.

¹¹¹*Damān*, p.109; *Mutlifāt*, p.73.

¹¹²*Mutlifāt*, p.74.

¹¹³*Mukhtaṣar*, p.134.

In a normal situation, *ḥaylūlah* is associated with the detention of the property. Some jurists have attempted a survey of a reverse situation of *ḥaylūlah*, that is when the owner is the one being detained instead of the property. This takes place when the owner is being held and prevented from taking charge of the property and destruction eventually occurs. The Ḥanafī¹¹⁴, Ḥanbalī¹¹⁵ and Shāfiʿī¹¹⁶ schools agree that there will be no *ḍamān* if the owner is being held and denied control of his property which leads to its destruction. Their decision is founded on the fact that nothing has been done to the property and *wadʿ al-yadd* cannot be established.

e] Deception (*ghurūr*).

Literally, the word *ghurūr* originates from the verb *gharrā* carrying the meaning of deception and beguilement.¹¹⁷ Technically, the jurists have employed the term *ghurūr* to denote the meaning to lead a person and direct him through a wrong way to accept something which does not actually bring about benefit to him. This is carried out by supplying a favourable impression about the utility of the merchandise and if he should know the real state, he would not accept it. Based on this definition, it can be suggested that *ghurūr* can only be established by an act of

¹¹⁴*Majmaʿ*, p.107; Ibn ʿĀbidīn, *Radd al-Mukhtār*, vol.V, p.145.

¹¹⁵Al-Buhutī, *Kashshāf al-Qināʿ*, vol.II, p.366.

¹¹⁶*Wajīz*, vol.I, p.206.

¹¹⁷*Lexicon*, vol.II, p.2237. Lane has also cited the concept of *gharrathū al-dunyā* explaining it as the world deceived him or beguiled him by its finery or show or pompous. He also cited a Qurʾānic verse which reads : What hath deceived thee and led thee to error, so that thou has neglected what was incumbent on thee to thy Lord?.

promoting a merchandise by fraudulent means and describing the object differently from its actual characteristics. Such must be accompanied by fraudulent motives and malignant intentions.¹¹⁸

As in *ḥaylūlah*, the jurists argued the case of *ghurūr* on the premise of the same ḥadīth on *ḍarar*. If a fraudulent act managed to influence a purchase, there is a manifest injury on the purchaser. The injury need to be removed and it can be done by making the fraudster liable to make reparation deemed appropriate.¹¹⁹ Ibn Ḥazm opposed this standpoint saying that *ghurūr* could not become a ground for *ḍamān* as fraud did not cause direct injury. Rather it is executed by the affected party himself.¹²⁰

In replying to Ibn Ḥazm, the majority of scholars maintained that deception has been overwhelmingly accepted as a ground for *ḍamān*. One of them, Ibn al-Qayyim, argued, saying :

“....then establish justice by allowing the victim of fraud (*maghrūr*) to go back to the person who committed the wrongful act to recover the loss he suffered. Analogy and justice ruled that whoever causes destruction on the property of another or causing him to suffer loss, would be liable to pay compensation on the same basis as *itlāf* though the damage done is indirect. Direct or indirect is immaterial as far as *ḍamān* is concerned”.¹²¹

It must highlighted that *ghurūr* is different from *gharar*, another prevailing concept in the literatures on Islamic law of civil transactions. Despite the fact that

¹¹⁸*Ḍamān*, p.194.

¹¹⁹*Mutlifāt*, pp.82-85.

¹²⁰Ibn Ḥazm, *al-Muḥallā*, vol.II, p.2111.

¹²¹*A'lam*, vol.II, p.158.

they have common features in the sense of being prohibited, it is necessary to see, at least, two basic differences between them. Firstly, fraud can be in the form of either utterance or action aimed at deceiving a party in the contract, whereas *gharar* has no element of deception of either party in the contract. For instance, if a man purchases a lost riding animal from a seller and the latter knew the animal's whereabouts, it is *ghurūr*. However, if he has no knowledge about it at all, it is *gharar*. Secondly, *ghurūr* will give rise to a newly created right, in favour of the affected party, to rescind the contract. *Ghurūr* has an inherent defective element, which is deleterious to mutual consent (*riḍā*) needed in a perfect transaction. As for *gharar*, the contract will be rendered invalid by virtue of the element of uncertainty, contradictory to public interest promoted by the *Sharī'ah*. In such case, public interest should prevail over private rights.¹²²

Fraud can either be by statement (*qawlī*) or by action (*fi'li*).¹²³ The remedy for fraud granted by Islamic law is specifically the right to exercise option for fraud (*khiyār al-taḍlīs*) which is considered as an important hallmark in Islamic consumer protection law.¹²⁴ However, there are two conditions to be satisfied before a fraudulent act is actionable in the eyes of the law. Firstly, the complainant must have suffered material damage (*ḍarar māddī*) accepted by commercial standard and practice. Such standards are determined by the custom and usage of

¹²²Siddiq Amīn al-Ḍarīr, *al-Gharar wa Atharuhu fī 'l-Fiḥ al-Islāmī*, pp.36-37.

¹²³Fraudulent statements are like telling inaccurate or misrepresented facts about the negotiated merchandise, market price and anything related to the trading, in order to gain advantages. Fraudulent actions are like the classical example of *muṣarrāt* (tying the udder of an animal to show high yield of milk), dyeing an old garment and the like. For detailed treatment on the subject with comparison with the English Legal System, see Mohd.Ali Baharom, *Misrepresentation : A Comparative Study Between English and Islamic Law*, 1988.

¹²⁴*Commercial*, pp.70-71.

the said society.¹²⁵ Secondly, the fraudulent act must be cunning to the degree that it would aim to deceive any ordinary person.¹²⁶

The jurists hold different views concerning *ghurūr* both by statement or action. In the Mālikī school, it is a consensus that *ḍamān* is compulsory in fraudulent acts but not statements. Actions like dyeing an old garment to look new, spilling ink on the hands and clothes of a slave to mark his literacy, are accepted as grounds for imposition of *ḍamān*. But if a financial dealer (*ṣayrafi*) who undertakes to verify the soundness of a currency and the currency was later found as counterfeited and a tailor who measures cloth and confirms that it is sufficient for the intended garment, liability is unlikely to be established.¹²⁷

The Ḥanafīs came up with a more detailed account of the subject by opining that one who deceives is not liable for *ḍamān* except in four different circumstances. First, the fraud must take place in bilateral and commutative contracts.¹²⁸

“If any party to a contract, upon consideration, deceives another party thereto, such party must make good any loss caused to the other. For example, a person buys a piece of land and erects a building thereon. Thereupon, a person appears, who proves to be entitled to such land and takes possession thereof. The buyer is entitled to recover the value of the land from the vendor and in addition the value of the building at the time of handing it over”.¹²⁹

Second, the fraud takes place in a transaction which brings about benefit to the giving party. Third, the fraud takes place in a transaction attached to a condi-

¹²⁵The maxim reads: “Public usage is conclusive evidence and action must be taken in accordance therewith.” *Maj. Adliyyah*, art.37.

¹²⁶*Commercial*, p.73.

¹²⁷Al-Ḥattāb, *Mawāhib al-Jalīl*, vol.VI, p.438.

¹²⁸Al-Ḥaṣkafī, *Durr al-Mukhtār*, vol.IV, p.221.

¹²⁹*Maj. Adliyyah*, art.658.

tion. If a person gives a piece of cloth to a tailor for his garment saying that : "if the cloth is sufficient for my garment, you can proceed with cutting the cloth", means that the owner has consented to cutting with a condition. Fourth, if the deceiver offers guarantee involving safety in express terms, and the guaranteed party suffers injury, he is liable. However, if there is no guarantee attached but as mere information, no liability would arise.¹³⁰

The Ḥanbalis seem to agree with these opinions. In their texts, it was mentioned that in the case of demolition of building erected on the land belonging to others, the vendor would be held responsible as his deception has led the buyer to erect that building.¹³¹ In a Shāfiʿī text, it was opined that *ḍamān* is still imposed in the case of a fraudulent statement (*ghurūr qawlī*) provided that it is accompanied by a condition.¹³²

As a conclusion, it is clear that a fraudulent act is an absolute ground for *ḍamān*, according to majority of jurists. However, fraudulent statements, according to the majority opinion, did not give rise to liability, but it is a sinful and unscrupulous pursuit.

1.6 Function of Ḍamān : Protection of Rights.

¹³⁰Ibn ʿĀbidīn, *Radd al-Mukhtār*, vol.III, p.83; *Fatāwā Qāḍikhān*, vol.VI, pp.221-223.

¹³¹*Qawāʿid*, pp.226-227.

¹³²*Muhadhdhab*, vo.I, p.414.

From the outset, it is evident that the main function of *ḍamān* is to protect the rights of mankind. In this respect, it is essential to bring up the Islamic theory of right. Although "right" is established as the primary meaning of *ḥaqq* [pl. *ḥuqūq*] in the field of law, outside the law, its dominant meaning is truth or something which corresponds to facts. Both meaning are equally prominent, so much so that some lexicographers consider the second meaning to be the primary one.¹³³ In the context of law, right, power and claim signify other equally prominent meanings. Some writers added beneficence and public good (*al-khayr wa 'l-maṣlahah*) to the list of meanings attributed to *ḥaqq*.

In the Qur'ān, the term *ḥaqq* occurs frequently, denoting the notion of certainty and proof of values, rewards, promises and punishments.¹³⁴ The term is also employed interchangeably with duty (*wājib*) and it can also mean a right as an opposite of an obligation.¹³⁵ Occasionally, *ḥaqq* denotes the Muslims' ultimate victory and salvation¹³⁶, the cause of justice and truth¹³⁷ and it was also concluded that *ḥaqq* is inextricably linked with justice and benevolence (*'adl wa ihsān*) and they are the ultimate values sought wherever *ḥaqq* appears in the Qur'ān.

¹³³D.B.MacDonald and E.E.Calverley, "Ḥaqq" *EI*(2), pp.82-83. Also see M.H.Kamali, "An Analysis of Right (Ḥaqq) in Islamic Law", *AJISS* pp.340-366. For detailed treatment on the subject, particularly in the realm of property right and personal liability see Muṣṭafā Aḥmad al-Zarqā', *Nazrat 'Āmmah fī Fikrat al-Ḥaqq wa 'l-Itizām wa Naẓariyatay al-Amwāl wa 'l-Ashkhāṣ fī 'l-Fiqh al-Islāmī*, 1948.

¹³⁴Kamali, *ibid.*, p.343.

¹³⁵*Q.al-Dhāriyāt*(51) : 19 reads: And in their wealth and possession (was remembered) the right of the (needy), him who asked and hi who (for some reason) was prevented (from asking).

¹³⁶*Q.*, *al-Rūm*(30):47 reads :....and it was made due from Us to aid those who believe.

¹³⁷ *Q.*, *al-Baqarah*(2):42 reads : And cover not truth with falsehood nor conceal the truth when ye know (what it is).

Classical jurists did not articulate a juridical definition for *ḥaqq*, but rather relied on its linguistic meaning. They may have done so because the word is clear and versatile and because its juridical usage often comes close to its literal meaning. Ibn Nujaym's definition of *ḥaqq* as "the entitlement of a person to a thing" (*al-ḥaqq mā yastaḥiqquhu al-raḥul*) and "an exclusive assignment" (*ikhtiṣāṣ ḥājiz*), though seemingly inconclusive, but at least shed some light to the analysis of the subject. Muḥammad Yusūf Mūsā said that *ḥaqq* is "a benefit (*maṣlahah*) which the Lawgiver has granted to the individual, or the community or both." The definition by al-Darīnī, which is perceived to be comprehensive reads: "*Ḥaqq* is an exclusive appropriation or power over something, or a demand addressed to another party which the *Sharī'ah* has validated in order to realize a certain benefit".

Ḥaqq in Islamic law seems to be essentially goal-oriented and normally contemplates a benefit. For instance, if it is used in a way that violates the benefit it is proclaiming, the right has been abused.¹³⁸ As far as justice is concerned, there is a possibility that following a *Sharī'ah*-oriented policy (*siyāsah shar'iyyah*) could result in cases where justice under the law might not be consonant with the greater benefit or interest.¹³⁹

As a general rule in Islamic law, rights and obligations do not exist unless there is evidence to suggest otherwise. Such a rule is designated as *barā'at al-dhimmah al-aṣliyyah* (original absence of liability) by which is meant a presump-

¹³⁸Muṣṭafa Zarqā', *Nazrah 'Āmmah fī Fikrat al-Ḥaqq wa 'l-Iltizām wa Nazariyyatai al-Amwāl wa 'l-Ashkhāṣ fī 'l-Fiqh al-Islāmī*, pp.7-9.

¹³⁹Kamali, op.cit., p.346.

tion that can only be overruled by positive evidence. The only exception to its application noted here appears in the case of *al-ḥuqūq al-fiṭriyyah* (natural rights) that come into being without legal cause.¹⁴⁰ The direct causes of *ḥaqq* are *Sharīʿah* rulings, contract, unilateral commitment, inheritance, a lawful act and the violation of another's right, which may create a right to compensation on the part of the aggrieved party.¹⁴¹

In this respect, it is also important to realize the divisions of rights available. Firstly, rights attributed to the right of God (*ḥaqq Allāh*), in which public rights rest and secondly right of individuals or private rights (*ḥaqq al-ʿabd*). As far as private right is concerned, Islamic law recognizes it as a prerogative of its bearer. However, in the event of conflict with a public right, the public right should prevail. In his article, Kamali highlighted another division of rights as discussed mainly in the context of property and ownership. Those rights are *al-ḥaqq al-mubāḥ* (permissive right), *al-ḥaqq al-thābit* (imperfect right) and *al-ḥaqq al-muʾakkad* (perfect right). He further said that both permissive and imperfect rights are weak in the sense that they cannot be sold, inherited or used to form the basis for compensation (*damān*).¹⁴²

Conclusion.

This chapter has provided the research on *damān* with a brief theoretical bases. Various prescriptions in the Qurʾān and Sunnah touching the matter directly

¹⁴⁰Kamali, op.cit., pp.346-347.

¹⁴¹Fathī Abu Sinnah, "Nazariyat al-Ḥaqq" cited in Kamali, ibid, p.347.

¹⁴²Kamali, ibid., pp.350-351.

or indirectly, are being highlighted. The scope of *ḍamān* as treated in classical sources of Islamic law are surveyed. Similarly, the grounds of *ḍamān* are explained to develop some familiarity with them as they will be involved the whole endeavour this present work seeks to achieve.

Based on the foregoing analysis, the research will pursue further examination on the use of *ḍamān*. It will operate on two major themes, namely *ḍamān* in the sense of suretyship and *ḍamān* in the sense of remedial measures for contractual wrongs. The study of suretyship involves the study of personal guarantee, documentation of contract, the importance of collateral securities, the function of mortgage as well as methods of settlement in the event of default and insolvency. The extended role of *kafālah* in the modern banking by use of various negotiable instruments will be focussed on.¹⁴³ The notion of *gharāmah* in offering remedies in contracts, will occupy a larger space in the research. This will involve application of *ḍamān* in cases of sales involving defective goods, misrepresentation, mistake and the like. Compensation in the contract of work and liabilities of professional artisans will also be discussed.¹⁴⁴

Apart from that, the general notion of protection of rights of both consumers and producers will be given attention, especially while looking at the contemporary development on *ḍamān* related legislation in Muslim countries.¹⁴⁵ The

¹⁴³Chapter II.

¹⁴⁴Chapter III.

¹⁴⁵Chapter VI.

understanding of the whole subject will be enhanced by an analysis of the methods and procedures¹⁴⁶ and the institutional framework¹⁴⁷ in applying *ḍamān*.

¹⁴⁶Chapter IV.

¹⁴⁷Chapter V.

CHAPTER TWO

DAMĀN IN CONTRACT OF SURETYSHIP.

“The Prophet is reported to have said in his sermon during *hajjat al-widā'*: “A property on loan [whether through *‘āriyah* and *minḥah*] should be returned [as per the agreement], a debt should be repaid and a surety (*kafil*) is liable [for the undertaking of the debtor]. Indeed God had rendered every right to their bearers and there will be no right of receiving a bequest by a legal heir.”
[Abū Dawūd, *Sunan* [Kitāb al-Buyū'], no.3565]

In its simplest form, *kafālah* is a collateral promise to answer for the debt, default or miscarriage of another person. In this regards, the surety is taking responsibility for the due performance of the obligation of another person (whether imposed by law or contract) in the event of that person failing to perform that obligation as required.

Thus, a guarantee is a form of security contract. It reinforces the obligation of the principal debtor with a secondary undertaking that is the obligation of a surety (*kafil*). Although no precise figure can be produced, there is little doubt that guarantees are among the most common form of security in use in commercial transactions and that vast sums of money are lent every year on the strength of guarantees.¹

¹See Kevin Patrick McGuiness, *The Law of Guarantee*, Carswell Sweet and Maxwell, Toronto, 1986, p.1.

The law of guarantee² is part of the law of contract. The law of contract is part of the law of obligations. The law of obligations in Islam is concerned with the sources and remedies available for the obligee for the obligor's failure to perform the obligation voluntarily. Obligations which are performed voluntarily require no intervention from a court of law. They do not give rise to any cause of action. Islamic law is thus concerned with contracts as a source of obligation. The basic principle which the law of contract seeks to enforce is that a person who makes a promise to another ought to keep his promise. Each promise that a surety makes to a debtor by entering into a contract with him, creates an obligation to perform it.³

2.1 Definition of *dhimmah*

From the above statement, it is evident that the central issue of the subject is obligation. In the classical works of Islamic law, the term used to signify obligation is *dhimmah*⁴. Literally, *dhimmah* means a contract, treaty, engagement, bond

²The term guarantee is sometimes used as a synonym for the term warranty. While such usage is legally incorrect, it is etymologically sound. Like so many legal and non-legal terms, the word "guarantee" came into English language from Norman French. It is chosen from old French noun "garantiē" and verb "garantier". These old French words themselves derived from the Frankish word "garant", which is itself a derivation of an earlier form "warant" meaning warrant or supporter. Thus, the term "guarantee" and "warranty" share a same derivation and are in fact etymologically the same word, for in older times the "g" of Norman French is interchangeable to "w" of the Anglo-Saxon. Ibid., p.21.

³For details see *Maṣādir*, vol. II, p.40. Also see judgement of Lord Diplock in *Moschi v. Lep Air Services* [1973] A.C. 331.

⁴Schacht suggested that there exist no general term for obligation in Islamic law. The nearest approximation to it is *dhimmah* which means "care as a duty of conscience" as shown in the expression "the debtor has the performance in his care". See *Introduction*, p.144. Cf. Chefik Chehata, "Dhimma," *El(2)*, vol.III, p.231.

or undertaking. All these terms are associated with the notion of *dhimmah*, which originates from the rootword *dhammā*⁵, simply because the breaking thereof will necessitate blame. Further, it is also related to the notion of *ḥurmah* as it also includes the essence of *dhimmah* in the sense that it reflects the concept of sacredness and inviolability. This obligation also is supposed to be respected, honoured and defended.⁶

The concept of *dhimmah* is also discussed in the light of the notion of giving security, protection and safeguard (*amān*). Accordingly, it signifies the notion of responsibility for payment of a sum of money, for restitution, safekeeping, suretyship and others. Al-Atāsī in his commentary of the *Majallat al-Aḥkām al-ʿAdliyyah* said: “*Dhimmah* literally means ‘*ahd* (promise), *amān*(safety) and *ḍamān* (guarantee).”⁷ This is because *dhimmah* is a promise (or rather an obligation) attached to a person. As regards its relationship to the *dhimmah* of others, it means joining one person to another in respect of obligation in order to fulfill certain rights (*al-taʿahhud bi ʿl-ḥaqq*).

Therefore, *dhimmah* in Islamic law has always been associated with obligation. It is a legal attribute (*al-waṣf al-sharʿī*) that makes a person entitled to what he is legally entitled to, as well as burdening him with responsibilities.⁸ This principle is founded on the basis of the Prophetic tradition which reads: “*Al-Muslimūn tatakāfaʾ dimāʾuhum wa-yasʿā bi-dhimmatihim adnāhum.*” This ḥadīth means that when a Muslim enters into an obligation to give protection to an enemy for his

⁵This term carries the meaning of blamed, dispraised, reprehended.

⁶*Lexicon*, vol.I, p.976; *Maṣādir*, vol.II, pp.20-29.

⁷*Sharḥ Atasi* vol.III, p.1.

⁸The definition reads :[*waṣf sharʿiyy yaftariḍ al-shāriʿ wujūduhu fi ʿl-insān wa yaṣīr bihī aḥlan li ʿl-lzām wa ʿl-iltizām*].

safety (*amān*), he will exert himself to protect the non-Muslim protectorate (*dhimmi*) in their community even among the least capable person. The principle embodied in this ḥadīth is that whenever a person is duty bound to fulfill his obligation which is placed on his *dhimmah*, he is obliged to fulfill it. The promise will also be the genesis of *istiḥqāq* (vindication) if such arises.

“Since a person is duty bound to fulfill his obligation and pledge, then his obligation is considered as the source of demanding rights (*mansha’ al-istiḥqāq*) in respect of the claimant’s right and on the contrary, becoming the source of obligation (*mansha’ al-iltizām*) as regards the claimed party. Therefore *dhimmah* is the basis for a claim (*manāṭan li’l-talab*) so that when *dhimmah* is established, there will be a claim.”⁹

In another definition, *dhimmah* is said to be a matter determined by the *Shari‘ah* which is presumed to exist in a human whereby rights (*ilzām*) are accorded and obligation (*iltizām*) undertaken.¹⁰ Thus, a *dhimmah* is a point of assessment in a person pertaining to rights he is entitled to. In this respect, *dhimmah* is a personal obligation if it concerns that particular person himself. It covers financial rights, property rights and the like.

The notion of personal obligation is important in commercial transactions in order to explain a person’s liability. The obligation can only be established on a person, whether natural or juridical. The *dhimmah* is on each individual, limitless and cannot be shared with others. It will remain in a person during his lifetime, commencing from birth and ending with his death. The only question is, whether

⁹Madkhal, vol.III, p.24. Also see Zarqā’s special treatise on the subject in his *Nazrah ‘Ammah fi Fikrah al-Haqq wa ‘l-Iltizām wa Nazariyyatai al-Amwāl wa ‘l-Ashkhāṣ fi ‘l-Fiqh al-Islāmī*, Damascus : Maṭba‘ah al-Jāmi‘ah al-Sūriyah, 1948, pp.122.

¹⁰Al-Ḥimawī, *Ghamz al-‘Uyun al-Baṣā’ir Sharḥ al-Ashbāḥ wa ‘l-Nazā’ir*, vol.III, p.199. This is regarded as the legal quality which makes the individual a proper subject of law, that is, a proper addressee of the rule which provides him with rights or charges him with obligations.



that cessation will take immediate effect or will extend to a certain time until all his obligations have been fulfilled.

“The term goes to the root of the notion of obligation. It is the *fides* which binds the debtor to the creditor. The bond of the obligation requires the debtor to perform a given act and this act will be obtained at the demand of the creditor (*muṭālabah*). In the case of real right (*ḥaqq fi ’l-‘ayn*) on the contrary, no bond exists.”¹¹

2.2 Scope of Personal Guarantee in Islamic law.

Generally, the subject of *kafālah* is divided into three categories in almost all legal manuals. Firstly, *kafālah* is associated with the obligation to secure the appearance of the guaranteed person at the stipulated time at the request of the beneficiary of the guarantee.¹² Some scholars simply requires the appearance of the guaranteed person in a court proceeding or in an extra-judicial arbitration. The Hanafis are sceptical to depend on this method to enforce the law particularly outside the sphere of Islamic criminal law, *ḥudūd* and *qiṣāṣ*, as the guarantor or the bailor¹³ is only oblige to ensure the presence of the guaranteed person. He is not liable whatsoever with his debt neither he is “responsible for the debtor’s insolvency.”¹⁴ The other schools seem to be quite confident even this type of surety only concern with obligation to secure attendance, as that will be a pre requisite towards the settlement of any obligation falling due.

¹¹ Al-Nasafi, *Iṣṭilāḥāt al-Ḥanafīyyah* cited in Chafik Chehata, op.cit., p.231.

¹² Y.Linant De Bellafond, “Kafāla,” *EI*(2), vol.III, pp.404-405. Schacht said that standing surety for a person means undertaking the liability for the appearance of the debtor at a lawsuit; it is effective only if a lawsuit is possible. See *Introduction*, p.158.

¹³ See Ibn Nujaym, *al-Baḥr al-Rā’iq*, vol.VI, p.204.

¹⁴ *Mukhtaṣar*, p.96.

A surety for a person (*kafālah bi ʿl-nafs*)¹⁵ shall be released if he delivers the person guaranteed to the beneficiary in a place where settlement or if it is adjudication, as the case may be, can take place. If it is stipulated that the guaranteed person must be delivered to a court of law, the surety must do so and he is not allowed to deliver the guaranteed person at other places. The surety shall be relieved from this obligation upon death of the guaranteed person (*makfūl bihi*) as the ability to make him available at the place of settlement has become impossible. Similarly, if the guarantor (*kafīl*) dies, his obligation become extinct as he is no longer capable of delivering the guaranteed person at the required place. However, it will not be the case upon the death of the beneficiary, whose heirs shall have the right to require the surety to deliver up the person guaranteed at a specified time.¹⁶

The second category of *kafālah* is *kafālah bi ʿl-māl*. It is also known as surety for the claim. This means that the surety stands as a pledge to the creditor (*makfūl lahu*) that the obligation of the principal debtor will be fulfilled. In this type of suretyship, it is required that the secured obligation must be a liability of the principal debtor (*maḍmūnan ʿala ʿl-aṣīl*) and the obligation of the surety (*kafīl*) is dependent (*tābiʿ*) on the liability of the principal debtor (*aṣīl*). Suretyship for the claim can be independent or additional to suretyship for the person; if the guarantor stipulates that the debt of the principal debtor be remitted, its effect is that of *ḥawālah*.¹⁷

¹⁵In the Māliki school the term *ḍamān al-wajh* is used. See *Qawānīn*, p.279. This is important in long-distance trade and international commerce where local brokers and agents will give their suretyship for the foreign traders, before securing the confidence of local authorities and customers. See *Kafālah*, pp.169-176.

¹⁶*Naẓ Ḍamān ʿĀmm*, Kuwait, 1983, pp.37; *Maj.ʿAdliyyah*, art.642; *Maj.Sharʿiyyah*, art.1126.

¹⁷*Maj.ʿAdliyyah*, art.613; *Maj.Sharʿiyyah*, art.1196; *Introduction*, p.158.

The question of establishing the right (*thubūt al-ḥaqq*) in a *kafālah* contract has given rise to a lengthy discussion whether the debt in question will fall on the *dhimmah* of both the guarantor (*kafīl*) and the debtor (*madīn*) or exclusively on the principal debtor. Ibn Qudāmah in his *al-Mughnī*, a leading Ḥanbali text is of the opinion that the *dhimmah* will be established to both parties and this view is also subscribed to by the Shāfi‘i and Māliki schools of law.¹⁸ Only the Ḥanafis are taking a different stance by opining that: "the debt (*dayn*) will not fall on the *dhimmah* of the guarantor (*kafīl*)".¹⁹

Nevertheless, if one has a closer look into the issue, one will notice that it is not essential for the purpose of establishing the right, to consolidate the debt to the surety's *dhimmah* while it is subsisting on the *dhimmah* of the debtor. Even if the debt is established on the *dhimmah* of the surety, the creditor can only make on claim, from either the debtor or the surety. In this regard, one opinion said that the creditor can claim from anyone as he pleases, but the overwhelming view is that definitely demand for satisfaction of the debt must be made first to the principal debtor.²⁰

As regards the practical side of *kafālah*, Ibn ‘Ābidīn said that the fuqahā’ are unanimous in establishing the debt in question in a contract of suretyship to both the surety and principal debtor. Their arguments are, *inter alia*, that eventhough the suretyship is the joining of liability for claim purposes, it does not

¹⁸*Mughnī*, vol.V, p.8. In his *fatwā* al-Subkī said that : “Both the principal debtor and the surety can be demanded [to pay the entire debt] as *ḍamān* is similar to *rahn*. If *rahn* is attached to the entire debt, so is the case with *ḍamān*. See al-Subkī, *Fatawā al-Subkī*, p.368. O

¹⁹*Badā‘i*, vol.VI, p.2.

²⁰*Maj. ‘Adliyyah*, art.644.

amount to a proper debt which can be taken from the surety's estate upon his death. Obviously, right of claim (*muṭālabah*) is dropped upon the surety's death as the case in *kafālah bi 'l-nafs*, whereas the law in the textual authorities, even among the Ḥanafis - that the property will break up with the death of the *kafīl* and the lawful rights from his estate can be drawn. Therefore, Ibn 'Ābidīn can be said to be seeking a middle way in mediating the conflicting opinions.²¹

The third category is *darak* suretyship²² which simply means a guarantee to give indemnity if goods are owned by a third party. This is a suretyship to pay the price of property sold if there are third party rights subsisting in that property. No claim shall be made against the surety of a seller by way of *darak* unless judgement is given that a third party right subsists in the thing sold and the seller is ordered to return the price. This type of security is widespread in many societies.

“The buyer (*mushtarī*) can ask for a guarantor who can in order to ensure return of the price (*thaman*) should he find any defect (*'ayb*) that necessitates return of the good. On the same scores, if the sold goods belong to a third party or someone else has some other right like right of pre-emption (*shuf'ah*)”.²³

Essentially the *darak* is the guarantee against fault in ownership. The important place given to this guarantee is the written deed which reflects a prominent feature in Islamic law, the protection of ownership through a series of rules, among which is the protection of bona fide acquisition.

²¹Ibn 'Ābidīn, *Radd al-Mukhtār 'alā al-Durr al-Mukhtār*, Cairo, n.d., vol.IV, p.261; 'Alī al-Khafīf, “Al-Ḥaqq wa al-Dhimmah wa Ta'thīr al-Mawt fīhi,” cited in *Maṣādir*, vol.II, p.21.

²²*Maj. 'Adliyyah*, art.616. Cf. *Maj. Shar'iyyah*, art.1089. Art.1094 of this compilation provide even a wider protection under the notion of *damān al-sūq*. See also *Fatāwā*, vol.XXIX, p.549.

²³*Majma'*, p.233; *Qawānīn*, pp.286-287; *Kafālah*, p.146.

A *darak* guarantee is a guarantee given by the seller to make good should the buyer's title be contested by a third party. It is possible, for example, that prior to the transaction, and without the knowledge of the buyer (or seller), a third party had inherited all or part of the property sold, it had been given as a *waqf*, a slave had been manumitted, a neighbour exercised his right of pre-emption, or a creditor appears with a debt against the seller and declares his right to the property. If such a claim (*istiḥqāq*) is proven valid, the ownership of the property newly acquired by the good faith purchaser is thus defective. In a contract, the seller is accordingly bound to return to the buyer either the property itself, its price, its equivalent (if it is fungible), or its value together with the value of such improvements as were made by the buyer himself. Thus, *ḍamān al-darak* is a special kind of guarantee and is to be treated separately in the forthcoming chapters.²⁴

Normally, in the cultural experience of Islām in the Arab Middle East, the notaries often felt obliged to enumerate all the possibilities with regard to persons who might make a claim, the circumstances that might occur and the obligation of the seller. In Ṭaḥāwī's *Kitāb al-Ṣhurūṭ al-Kabīr*, *darak* matter has been inserted in the clause which reads:

“Should any claim be made against Fulān [the buyer] with respect to whatever is entailed in the sale, mentioned in the document, or any part of it or any rights attached to it, proceeding from any person whatsoever, then it is the responsibility of the Fulān [the seller] to deliver what is incumbent upon him as a duty, and what is required of him because of this sale, mentioned in this document.[He is responsible] until he delivers to Fulān, according to whatever this sale, mentioned in this document, makes binding on him in [the buyer's] favour.”²⁵

²⁴Jeanette Wakin, *The Function of Documents in Islamic Law* (The Chapters on Sales from Ṭaḥāwī's *Kitāb al-Ṣhurūṭ al-Kabīr*), New York, 1972, pp.60-61.

²⁵*Ibid.*, p.61.

2.3 Consolidation of Various Methods of Guarantee

The theoretical foundation of law of guarantee in Islām is comprehensive and susceptible to further extension. The theoretical framework, together with the jurisprudential justifications, will serve as a basis for further enlargement of this concept, beyond the coverage of the classical principles. There are a number of important subjects related to the discussion and will contribute to build the body of principles concerning guarantee.

Firstly, as the commercial life is getting more complicated day by day and the extent of people's honour towards trustworthiness and ethics in business is very much questionable, it is rather inadequate to rely on verbal guarantee. It was suggested that "the written commercial instrument, in practice is indispensable".²⁶

"Court records and written documents have played an important part in the practice of Islamic law from a very early period, even though they have generally been neglected in the legal theory of the *Shari'ah*. As early as the middle of the second century of Hijrah we hear a judge being dismissed from his post for failure to keep the records of his court in a proper manner, which implies that the keeping of such records had already become a normal part of judicial procedure. The use of written instruments in establishing contractual obligations and legal entitlements also became a feature of Islamic practice at an early date, and the consequent need for drawing such documents give rise to a distinct branch of legal literature from the eight century."²⁷

²⁶Ibid., p.9. As far as the contract of suretyship is concerned, the written document will serve, at least, to help establish the liability of the surety. It is not, at any rate, for purpose for the validiting the suretyship. See Sanhūrī's statement in the memorandum of the draft Egyptian Law cited in *Kafālah*, p.68.

²⁷R.Y.Ebied and M.J.L.Young, *Some Legal Arabic Legal Document of the Ottoman Period*, p.1.

These written documents are usually certified by a professional witness often exercised by the function of notary.²⁸ There are many practical advantages in consulting a witness or a notary to have a document drawn up, but the most important was that he would be likely to have a technical knowledge to produce a sound document, stylistically correct and recording a legally valid operation. All this development has taken place by a direct outgrowth of the *shurūṭ* literature.²⁹

The *shurūṭ* literature, in actual fact, grew out of the attempt by jurist to bring ideal theory and practice closer together. The aim is to keep practice under the control of doctrine. One of the way by which the jurists, particularly the scholars of Ḥanafī School, tried to accomodate practice was to create certain forms of literature that had as their immediate purpose the smooth operation of law and legal procedures in everyday life. This literature consisted of a variety of practical works, intended not to discover or even explain the law, but to help the *qāḍī* and other concerned persons in the law's application. The work on *shurūṭ* are an outstanding example of this literature. These handbooks, or formularies, were designed especially for the professional notary, and contained model contracts, legally correct in every detail, for all possible needs.³⁰ Other outstanding examples of this practical literature are the treatises on *ḥiyal*, legal devices or evasion. The *ḥiyal* works were handbooks showing interested persons, particularly the mer-

²⁸The dual role of the *shuhūd* is described by Ibn Khaldūn: "In every city,[the witness] have their own shops and benches where they always sit, so that people who have transactions to make can engage them to function as witness and register the (testimony) in writing." See *The Muqaddimah*, vol.I,p.462.

²⁹Documents are called *ṣakk* [pl.ṣukūk], *wathīqah* [pl.wathā'iq] or *dhukr* [pl.adhkār], also *dhukr ḥaqq* [pl.adhkār ḥuqūq]. The branch of legal science which deals with documents is called the science of *shurūṭ* (stipulations). See *Introduction*, p.82.

³⁰Wakin, op.cit, p.10.

chants, how they could follow the letter of law and yet arrive at a different result than what intended by the law.

In the Islamic West, *shurūṭ* is known as *wathā'iq* literature, the term popularised by the Mālikī school. Eventhough the Mālikī jurists were in fact hostile to the subject of *hiyal*, their interest in the formularies began at a very early date. The *wathā'iq* works eventually became closely connected with the *ʿamal*, the practice of courts, because the term of document were always drafted in accordance with this judicial practice, regardless of whether or not it agreed with classical doctrine.³¹

The *Sharīʿah*, as the ideal religious law, crystallized in the doctrine of the texts, was formally to replace those practices and standards of conduct that had evolved out of millennia-old experience. Despite that, in many legal spheres, the realities of everyday life were too compelling to permit conformity to these standards. This was particularly true in commercial law, where demands of an urban and increasingly complex society played a further strain on doctrine. Attempt have been made to reconcile between the inviolability of the *Sharīʿah* and certain practical needs and thereby institution never quite recognized by theory, make an attempt to survive. One of this was the practice of using written documents for private transactions.³²

Historically, it is proven that private contracts of all kinds depended on written instruments and from the earliest Islamic times were used extensively. Discussion will always centre on the interpretation of the Qur'anic verse³³, which con-

³¹Ibid., p.14.

³²Ibid., p.4.

³³Q., al-Baqarah (2): 282.

tains an explicit ruling on the necessity on documentation of contract (in some circumstances, at least):

"O you who believe, when you deal with each other, in transactions involving future obligations, in a fixed period of time, reduce them to writing. Let a scribe write down faithfully as between parties. Let not the scribe refuse to write as God Has taught him, so let him write. Let him who incurs the liability dictate, but let him fear his Lord God and not diminish aught of what he owes....Disdain not to reduce to writing [your contract] for a future period, whether [the amount] be small or big. Is is juster in the sight of God, more suitable as evidence, and more convenient to prevent doubts among yourselves. But if it be a transaction which you carry out on spot [direct cash sale] among yourselves, there is no blame on you, if you do not write it down. But take witnesses whenever you make a commercial contract, let neither scribe nor witness suffers harm...."

Despite the explicit ruling on the matter, supported by authority from the Sunnah that the Prophet ordered 'Ali to draw up a document in his name at Ḥudaybiyyah, the jurists never modified their attitude towards written documents by saying that it is only a recommendation (*mandūb; mustaḥabb*). In this regards, al-Ṭaḥāwī asserts that document are neither enjoined as a duty nor are they forbidden. They are useful support for oral testimony in that they help keep the debtor and creditor from forgetting the terms of their agreement.³⁴ Wakin observed that the Ḥanafīs were more hesitant in accepting written evidence but eventually the principle of *istiḥsān* (juristic preference) prevailed and this acceptance was finally confirmed, albeit in a rather negative way, in the *Majallat al-Aḥkām al-ʿAdliyyah*.³⁵

³⁴This issue is related one to another. For instance, it is not only the question of refusal to recognize written documents but it is also related to the role of a witness as *wazīfah diniyyah* (religious duty) and an attempt to safeguard oral testimony. Documents were proof only under restricted circumstances and only after qualified witness had attested their content. For details see Emile Tyan, "Le Notariat et le regime de la preuve par écrit dans la pratique du droit musulman," *Annales de l'Ecole Française de Droit de Beyrouth*, (1945) pp. 76 and 82-84 cited in Wakin, op.cit., p.8.

³⁵Ibid., p.4.

It is also suggested that in practice, the legal system can be dependent, to certain extent, to the practice of pledge (*rahn*) which has been institutionalised in order to serve the protection of rights in a loan agreement. Pledge simply means "setting aside property from which it is possible to obtain payment or satisfaction of some claim. Such property is then said to be pledged or given in pledge."³⁶

Legally, *rahn* is holding a property to secure certain right by which the satisfaction (*istifāʿ*) can be obtained. In this respect, an object bearing pecuniary value (*qīmah māliyyah*) according to the *Sharīʿah* is considered to be a security (*wathīqah*) by which payment of a debt can be assured. This type of security concern with a property (*wathīqah bi māl*) and not with the liability (*dhimmah*) of a person. *Rahn*, therefore, worth more than *kafālah*. In *kafālah*, securing rights (*tawāthūq*) lies on the *dhimmah* of the guarantor and not on the property held by the creditor (*dāʿin*). The connotation of the term "*wathīqah*"³⁷ is that the property is placed as security to the money owed and become an assurance that the debt can be satisfied from the pledged property.³⁸

It is a fundamental rule that the pledgee has the right of retaining possession of the pledge (*ḥabs*) until redemption thereof. In the event of death of the pledgor, the pledgee has a prior right over other creditors and may obtain payment of the debt from the pledge. Settlement can be made, whether in case of inability to pay the debt or upon death, by selling the property pledged, the pledgee will realize his

³⁶*Maj.ʿAdliyyah*, Article 701; *Maj.Sharʿiyyah*, art.940.

³⁷This term means bond, security or writing of obligation for payment of a debt or the like. See *Lexicon*, Supplement, p.3049.

³⁸*Fiqh Islāmī*, vol.V, p.180. See also discussion on *rahn* in respect of the liabilities of parties in the contract in chapter III, *infra*.

money back and if there are remainders, it will be returned to the pledgor or his heirs.

The above discussion concludes that the security devices in loan contracts can be better implemented using a multi-tier approaches. Personal suretyship (*kafālah bi 'l-nafs*) might be adequate for certain petty purposes in commerce, but if it is involving a massive amount and unexpected outcomes, one has to go beyond that. Formalization of a contract and writing it in standard formats is nothing but a call of necessity (*maṣlahah*) as it is needed by people as a measure to avoid injurious consequences (*ḍarar*) of default. This proposition is not only supported but also seen to be supported in various current legislations in Muslim nations as well regulations in various Islamic institutions involved in loan transactions.³⁹ This approach is necessary to ensure the smooth operation of granting loan and thus will speed the success of business in the society. The Islamic approach in settlement of a transaction, by resorting to the most reasonable [or humanitarian] solution before finally resorting to adversarial method, can be manifested in this multiple approach. At least, at the end of the day, there is something that anyone of the parties involved can turn to, rather than mere verbal promises which people will always deny.⁴⁰

2.4 Kafālah : A Gratuitous Contract

³⁹See Malaysian Islamic Banking Act 1983 and cf. Federal Commercial Code of the United Arab Emirates 1993.

⁴⁰See discussion on the operation of Islamic banks based on these various methods of security in chapter IV, *infra*.

In the classical works of Islamic law, *kafālah* is treated as a gratuitous contract (*‘aqd al-tabarru’*). It is also known as unilateral contract, a disposition that may be completed by unilateral will (*irādah munfaridah*), and not dependent on the act of both parties as in a bilateral transactions (*‘aqd al-mu‘āwadhāt*). It is considered as a good deed and subservience to God (*tā‘ah*) that will be rewarded, simply because the guarantor (*kaftl*) is willing to act as such, without any pecuniary return or legally known as without any consideration.

Generally, the legal manuals have adopted this notion of *kafālah* as being gratuitous. However, the change of time and circumstances has bring about a change of attitude towards *kafālah*, from being accepted as just a gratuitous contract to being considered as a burden and liability the guarantor has undertaken. If one traced the ancient legislation (*shar‘u man qablana*), there is a saying attributed to the *Tawrāh* pertaining *kafālah* which reads: “Verily the beginning of *kafālah* is attributed to regrets (*nadāmah*), its middle with blame (*mulāmah*) and its end with liability (*gharāmat*).”⁴¹ After the conclusion of the *kafālah* contract, the *kaftl* will blame himself or be blamed by people, and during the claim (*muṭālahah*) he will regret that has caused loss to his property and finally, he has to make compensation or to undertake the responsibility related thereto.

In the Bible, the same reminder was also given. For instance, in Proverb 8:13 it was mentioned: “Go not surety beyond your means - think any pledge a debt you must pay”.⁴² And in other proverb⁴³ it was said: “He is in a bad way who becomes surety for another, but he who hates giving pledges is safe. A person who

⁴¹ See *Fiqh Islāmī*, vol.V, p.131. For details see also *Durar*, vol.III, p.613.

⁴² *New American Bible*, Sirach 8:13 cited in McGuinness, op.cit, pp.8-15.

⁴³ Proverb 11:15, Ibid.

is a surety is liable to fulfill his commitment as you have been snared by the utterance of your own lips, caught by the word of your mouth".⁴⁴ There is no doubt that a guarantee is costly to the person who gives it, as it exposes him to a risk of loss to which he would not be otherwise exposed. In giving a guarantee, a surety assumes the liability of another in connection with the guaranteed obligation, although he may draw no direct benefit from the transaction to which that obligation relates.⁴⁵

One important issue to be considered during the present time, is whether or not a guarantor can obtain payment (*muqābil;ajr*) for the guarantee he gives. Wahbah al-Zuhayli is of the opinion that if the *kafil* requires the guaranteed person to pay for the guarantee and the person seeking the guarantee fail to obtain it through an active charity, then he is allowed to pay for it on the basis of necessity (*ḍarūrah*) or public need (*al-ḥājah al-‘āmmah*). He argued that if the expected guarantee cannot be secured it will result in inability to attain *maṣlaḥah* like doing business, to finance an important project, to go abroad for education and other things. He further argued that since the fuqahā' allow giving payment for purpose of performance of religious duties (*al-qurubāt wa al-ṭa'ah*) like teaching the Qur'ān, such payment is permissible in the case of guarantee. However, the charge or payment must be reasonable and not excessive.⁴⁶

2.5 Formalities in kafālah contracts.

⁴⁴Proverb 6:2, Ibid.

⁴⁵Cf. Gideon Lisbon, "Islamic Influence on Medieval Jewish Law? Sefer Ha'arevuth [Book of Surety] of Rav Shmuel Ben Hofni Gaon and its Relationship to Islamic Law," *SI* LXXIII [1991], pp.5-25.

⁴⁶*Fiqh Islāmī*, vol.V, p.161.

Abū Ḥanīfah and one of his disciples, Muḥammad al-Shaybānī held that the basic constituent of *kafālah* are offer (*ījāb*) and acceptance (*qabūl*)⁴⁷. However, his other disciple, Abū Yusuf, supported by other schools of law, opined otherwise, saying that mere offer will render a *kafālah* contract valid.⁴⁸ According to the latter's view, *kafālah* contract is completed if it is executed by an offer (*ījāb*) from the *kafīl*, in both *kafālah bi 'l-māl* and *kafālah bi 'l-nafs*. The acceptance by the debtor, according to the majority of jurists at this stage, is not essential. Neither is his consent, in so far as he has no objection to the dealing, material as has been pointed out in the case of Abū Qatādah. In that event, the mere saying which is an offer from Abū Qatādah : "The obligation will fall on me", has been accepted as a concluded suretyship, which made the Prophet agree to offer *janāzah* prayers for the dead obligor. There was no record of the creditor's acceptance of it. On the basis of this definition, *kafālah* is equivalent to joining (*ḍamm*) and obliging a claim (*muṭālabah*) which is supposed to be the responsibility on the principal debtor (*aṣīl*), and this can be concluded by the offer from the *kafīl*. It is being regarded as having the same liability as *nadhr*.⁴⁹

On the other hand, Abū Ḥanīfah, as represented by his student, Muḥammad al-Shaybānī maintained that, the consent (*ridā*) of the creditor (*makfūl lahu*) is required. This will emerge quite clearly in the discussion of conditions (*shurūṭ*) of *kafālah*. Among others, it is required that the creditor must be present in the session wherein the contract is concluded (*majlis al-ʿaqd*). At least, he can appoint a delegated person (*wakīl*) to accept it on his behalf. It is suggested that, some other social and cultural considerations, are the possible grounds why this opinion is

⁴⁷See Ibn ʿĀbidin, op.cit., vol.IV, p.261.

⁴⁸*Fiqh Islāmī*, vol.V, p.134.

⁴⁹See *Qawānīn*, p.325; *M. Muḥtāj*, vol.II, p.198; *Mughnī*, vol.V, p.72.

upheld. The creditor, whose rights are being given attention, must at least has the privilege of making a choice, whether or not to accept a surety. This is very true in the real practice, as often a surety is rejected by virtue of lack of certain qualities like trusworthiness, or relationship with the debtor.

Despite that opposition, the prevalent view remains that on the belief a guarantee may be concluded and become executory by the mere offer of the guarantor.⁵⁰ As a matter of compromise, a clause is often inserted which allows the person in whose favour the guarantee is made to decline to accept such a guarantee. Until such time as he does so, however, the guarantee is valid (*tabqā al-kafālah mā lam yarudduhā al-makfūl lahu*). Thus, if in the absence of the person in whose favour the guarantee is made, a person stands security for the latter recovering any amount due to him, and the creditor dies without receiving information that such person has stood security, the guarantor is still bound thereby. As regards the consent (*riḍā*) of the debtor (*makfūl ‘anhu*), it is unanimously decided that this is not essential at all. Paying off the debt of another person without his permission is permissible, even though his permission is preferred.

The subject of *ṣighah*, that is the manner the intention is being communicated, is an integral part of a contract of *kafālah*. It is an important acknowledgement by the parties involved that they have to enter into such undertaking. There are difference of opinions in details on how the *ṣighah* should be executed but nevertheless, it is important, at least in determining whether the *kafālah*, is attached to a person or to property.⁵¹

⁵⁰*Maj. ‘Adliyyah*, art.621.

⁵¹*Kafālah*, pp.51-61.

The *Majallat al-Ahkām al-‘Adliyyah* is clear on the subject and this trend has been followed by other compendiums like *Murshid al-Ḥayrān* as well as the subsequent legislation in Middle Eastern countries. A *kafālah* contract is valid and effective if pronounced by a special expression (*ṣīghah mu‘ayyanah*), and the wordings to be employed, according to Ḥanafis and Shāfi‘is, can either be expressed (*ṣarīḥ*) or implied (*kināyah*). This simply denotes any utterance that signifies an obligation in the custom and usage of a society.⁵² This is provided in the Majallah as:

“The offer of the guarantor, that is, words used importing guarantee, are any words which by custom are evidence of an undertaking to be bound. Example: Ali states that he has stood security, or that he is a guarantor, or that he is ready to indemnify someone. A valid contract of guarantee is thereby concluded.”⁵³

Despite the overwhelming acceptance of both expressed and implied undertakings, it is suggested that it is better to have a *ṣīghah* which means nothing but the undertaking of the guarantee. This is due to ever increasing complexities in business life and the potentials of having disputes in most situations. By taking this step, it is hoped that the administration of justice in civil matters is going to be much easier. All terms employed in various classical works can be used, for instance, the term *kafīl*, *dāmin*, *za‘īm*, *gharīm*, *ḥamīl* and *qabīl*. All these terms are derived from various evidences on the validity of *kafālah* and considered express terms to denote nothing but suretyship.⁵⁴ This it hoped will ensure that potential

⁵²See Ibn Humam, *Fatḥ al-Qadīr*, vol.V, p.292 ; *Badā‘i‘*, vol.VI, pp.2-3; *Majma‘*, p.265.

⁵³*Maj. ‘Adliyyah*, art.622. Also see *Sh.Bāz*, vol.I, p.336.

⁵⁴ See Q. Ṭāhā (20):40; al-Qaṣaṣ(28):12; Şād(38):23; al-Naḥl (16):91 ; Yūsuf (12):72 ; al-Isrā’ (17):92; al-Qalam(68):40.

disputes can be prevented from taking place by providing such guidelines before a contract of *kafālah* is concluded.

The jurists have also outlined the conditions (*shurūʿ*) of a valid *kafālah* contract. All prime constituents of a suretyship are subject to scrutiny, before a *kafālah* contract can be concluded and thus effective. Therefore, there are a few sets of conditions, which apply to the surety (*kāfil*), the original debtor (*aṣīl*)⁵⁵, the creditor (*makfūl lahu*)⁵⁶ and the subject of the liability (*makfūl bihi*).

As far as the surety is concerned, it is required that he must be a person of full capacity (*ahliyyah kāmīlah*)⁵⁷, without any defects whatsoever. This is known as the state of *rushd*, being creditworthy and prudent in management of his property. As *kafālah* is a transaction involving property, therefore it cannot be executed by a lunatic (*majnūn*), a minor (*ṣabī*) and a person who is subject to impediments (*ḥajr*) because of prodigal (*safah*), as all of those are lacking in their prudence (*rushd*).⁵⁸

“In order to be able to make a contract of guarantee, a surety must be of sound mind and must have arrived at the age of puberty (*bāligh*). Consequently, a madman, an imbecile and a minor cannot make a valid contract of guarantee. If a minor becomes a guarantor while a minor and after arriving at the age of puberty ratifies the contract of guarantee, he cannot be made to abide thereby.”⁵⁹

Another important condition prescribed by the jurist is freedom (*hurriyah*). The transaction from a slave (*ʿabd*) is not accepted, on the ground that being a gra-

⁵⁵ Also known as *al-madīn*.

⁵⁶ Also attributed as a claimant or plaintiff (*al-muddaʿī*) and the one who gives away his property as debt (*dāʿin*).

⁵⁷ A person who is legally competent to manage and dispose his own property (*kullu jāʿiz al-taṣarruf fī mālih*). See *Mughnī*, vol.V, p.78.

⁵⁸ *Fiqh Islāmī*, vol.V, p.140.

⁵⁹ *Maj. ʿAdliyyah*, art.628.

tuitous contract (*tabarruʿ*), the slave has no right to give his benovelence except by permission from his master. Nevertheless, unlike the first condition, the *kafālah* contract given by a slave fails in terms of its effects (*nafādh*), but still considered a concluded contract. The second condition seems to be rather remote as the institution of slavery has ended. The only focus now will be on the question of full capacity of transaction, which is an integral part of the institution of suretyship.⁶⁰

Pertaining to the original or principal debtor (*aṣīl*), it is prescribed that he must be capable of delivering the guaranteed obligation by himself or through his agent. This is ruled by the Ḥanafis as they argued that *kafālah* is not valid if involving the debt of a deceased who died without any estate to repay the debt. They consider the debt as being dropped (*dayn sāqiṭ*) and thus cannot become a valid subject of suretyship. They equate this case to the case of release from the debt (*ibrāʾ*), as the liability (*dhimmah*) of a person will disappear with death. The debt will not remain with him, whereas *ḍamān* is the act of joining the liability (*dhimmah*) in the course of making claim.⁶¹

The two leading disciples of Abū Ḥanīfah, Abū Yūsuf and Muḥammad al-Shaybānī have joined the majority of jurists⁶² to opine that contract of suretyship involving a dead obligor is valid, by virtue of the Qatādah case, wherein the Prophet has asked a person to stand surety to the debt of the dead obligor.⁶³ That debt is an established debt (*dayn thābit*), and therefore the law permits to offer

⁶⁰For a fuller discussion see Ibn ʿĀbidīn, *Ḥāshiah Ibn ʿĀbidīn*, vol.IV, p.5. See also *M. Muḥtāj*, vol.II, p.7 ; *Madkhal*, p.407.

⁶¹*Badāʾiʿ*, vol.VI, p.132 ; Ibn Humam, *Faṭḥ al-Qadīr*, vol.V, p.119.

⁶²Ibn Rushd, *Bidāyat al-Mujtahid*, vol.II, p.294 ; al-Dardīr, *al-Sharḥ al-Kabīr*, vol.III, p.321 ; *Muḥadhdhab*, vol.I, p.339 ; *Mughnī*, vol.IV, p.537.

⁶³Al-Shawkānī, *Nayl al-Awṭār*, vol.V, p.206.

damān (guarantee) for it. This is treated as being on the same standing as the case of default of payment (*khalafa waḡā' li dayniḡ*). The authority for the establishment of this debt is that if a person is benovelently willing to pay off the debt, the creditor (*ṣāḡib al-dayn*) is allowed to make a settlement. This is very much similar to the case where the person gives guarantee for the debtor during his lifetime and the latter dies, the *dhimmaḡ* of the guarantor is not released and his liability remains.⁶⁴

The law has also required that the principal debtor (*aṣḡl*) is known (*ma'rufan*) by the guarantor. If the guarantor says: "I give my guarantee to anyone of those group of people," the *kafālah* is invalid. This requirement is only to identify the guarantor to the person guaranteed, his creditworthiness and his capability of repaying the debt. Nevertheless, the debtor's physical presence is not required, as the necessity for suretyship will normally take precedence over the non-presence of the debtor.⁶⁵

The next subject will be the conditions of a creditor in whose favour the guarantee is given. The surety must also know who the creditor is (*ma'lūman*) for if a surety is giving a guarantee in favour of a person unknown to him, this is unacceptable as he cannot deliver the very purpose of *kafālah* that is security (*al-tawathuq*). The Ḥanafis and Shāfi'is have the same view on the basis that knowledge of the creditor is necessary because the creditors might have difference in their attitude towards the unpaid debt.⁶⁶

⁶⁴*Fiḡh Islāmi*, vol.V, p.141.

⁶⁵This stand was confirmed by some scholars, among others Ibn Rusḡd, *Bidāyat al-Mujtahid*, vol.II, p.293 ; *Badā'ī'*, vol.VI, p.6 ; *M.Muḡtāj*, vol.III, p.204.

⁶⁶See *Mabsūṡ*, vol.XX, p.9; *M.Muḡtāj*, vol.II, p.200.

The Mālikīs and Ḥanbalīs however, permitted conclusion of a *kafālah* contract even without any knowledge by the surety of the creditor. This standpoint is based on the the verse on *kafālah* in the Qur'ān⁶⁷ wherein Prophet Yusuf has given a guarantee that whoever comes with a water container (*ṣuwā'*) belonging to the King, will be rewarded with a camel-load of foodstuff. Ibn al-‘Arabī is of the opinion that in this verse the identity of the interested party was not revealed. The announcement about the reward is not given by the “king” himself, but through an intermediary, Yūsuf.⁶⁸

Another condition advanced by the Ḥanafīs, requires the creditor to be present in the session where the contract is concluded. According to the Ḥanafī doctrine⁶⁹, the creditor should be present in the *majlis* to accept the contract or at least to be represented by a representative. *Kafālah* is underlined with the notion of giving ownership (*tamlīk*) and that can only be accepted by an interaction of offer and acceptance. In relation to this condition, it is also required that the creditor is mentally sound and enjoys full capacity. This line of discussion within the Ḥanafīs, between Abū Ḥanīfah and Muḥammad al-Shaybānī and Abū Yūsuf, is similar to the debate on *ṣighah* as discussed earlier.

The secured obligation or the subject of *kafālah* contract (*makfūl bihi*) has at least three conditions. Firstly, the secured obligation must be a liability of the debtor (*aṣīl*) whether in form of debt (*dayn*), object (*‘ayn*), person (*nafs*) and performance (*fi‘l*). These liabilities only applies to property which is capable of being

⁶⁷Q, Yusuf (12): 72.

⁶⁸Ibn al-‘Arabī, *Aḥkām al-Qur’ān*, vol.III, p.1085.

⁶⁹Opinion of Abū Ḥanīfah and Muḥammad al-Shaybānī.

subject to liability (*maḍmūnan bi nafsihā*). It will not apply to property held on fiduciary relationships (*ʿuqūd amānah*) as it cannot involve in a debt. Secondly, the secured obligation must be a kind deliverable by the *kafīl*. This will make the deal beneficial. This is the reason why the jurists have categorically rejected *kafālah* in *ḥudūd* and *qiṣāṣ* cases. Compliance to them by a *kafīl* is impossible as there will be no representation (*niyābah*) in undertaking a punishment. After all, the *kafālah* contract will not deliver any benefit. *Kafālah* is security method (*istithāq*) whereas *ḥudūd* is based on “abandonment upon occurrence of doubt (*shubhāt*)”, and there are not harmonious one to another. There can be no compulsion for a *kafālah* to be given in such cases and if it is so granted, it will only be confined to settle civil matters not criminal. Thirdly, the secured debt must be a proper debt (*dayn ṣaḥīḥ*) which simply means an obligation that be relinquished by performance (*ādāʾ*) or release from the said obligation (*ibrāʾ*).⁷⁰

2.6 Legal Consequences of Kafālah Contract.

A concluded *kafālah* contract will bring about at least two legal values (*aḥkām*), namely establishing the right to demand from the guarantor (*kafīl*) of what is liable on the principal (*aṣīl*) and right of the guarantor (*kafīl*) to demand from the principal debtor (*aṣīl*).

"The effect of a contract of guarantee is a claim. That is to say, it consists of the right of the person in whose favour the guarantee is made to claim the subject matter of the guarantee from the guarantor."⁷¹

⁷⁰Mughnī, vol.V, p.97; Majmaʿ, p.271. See also *Fiqh Islāmī*, vol.V, pp.143-148; *Kafālah*, pp.75-84.

⁷¹Maj. ʿAdliyyah, Article 634; Maj. Sharʿiyyah, art.1146.

What is demanded, at this stage, will depend on the type of the *kafālah* concluded by the parties. If the *kafālah* involves debt (*dayn*), the guarantor can be required to satisfy the entire debt if he is the only surety. If there are two sureties, both of them will share the burden equally provided that there is no specific terms on the matter, as both of them are on the same standing as far as the *kafālah* is concerned. The creditor will have to take into consideration the division of obligation (*al-inqisām*) by which he has to apportion his right of claim (*ḥaqq al-muṭālahah*).⁷²

On the other hand, if the agreed terms involved *kafālah bi 'l-nafs*, the surety is duty bound to ensure the attendance of the *makfūl*, if that can be done. If he is not available the *kafīl* can ask for some time until his attendance can be assured. If he has not produced the guaranteed person during the stipulated time and there is no evidence of his inability to do so, the *qāḍī* can have him arrested him until the satisfactory evidences of his failure based on circumstances, testimonies and others can be produced. Then only he will be released and allowed deferment until he is in the position to produce the guaranteed person.⁷³

“If any person guarantees to produce another at a given time and in the event of his failing to do so, guarantees to pay the debt of such person, and fails to produce such person at the appointed time, the guarantor is obliged to pay the debt. In the event of the death of the guarantor, the heirs must produce the persons whose appearance is guaranteed at the time agreed upon, or if such person surrenders himself in accordance with the contract of guarantee, the guarantor’s property is freed from all liability. If they fail to produce the person guaranteed, or if such person fails to surrender himself, the estate of the guarantor becomes liable for payment of the debt. In the event

⁷²*Badā'i*, vol.VI, p.10; *Mabsūṭ*, vol.XIX, p.162; *Qawānīn*, p.325; *Fiqh Islāmī*, vol.V, p.148.

⁷³*Badā'i*, vol.VI, p.10.

of the death of the person in whose favour the guarantee is given, his heir may claim."⁷⁴

The law has anticipated that difficulties may arise as regards securing debtor's attendance, as it is quite natural that he might just hide somewhere so that his whereabouts is unknown. Hence, it is provided that a guarantor may make an application for an order preventing the person for whom he stands surety from travelling abroad if there is evidence that caused a fear that the surety will suffer loss.

" A creditor can seek help from the ruler (*ḥākim*) when a debtor who deferred the payment of debt, if wishes to leave the country before the debt falls due, asking him to name a surety (*kaḥīl*) and the debtor is compelled to do so."⁷⁵

Eventhough there are few opinions within the Ḥanafī school as regards this issue, the prevalent view adopted by the Majallah is that by endorsing the above ruling it protects the right of people from any economic loss and destruction, especially during this era (*fī hadhā al-zamān*). The call of public interest (*maṣlahah*) arises as a result of declining honesty and ethical standard among merchants.⁷⁶ This phenomenon has been confirmed by Ibn Khaldūn that: "Now, (honest) traders are few. It is unavoidable that there should be cheating, tampering with merchandise which may ruin and delay payment which may ruin profit..."⁷⁷

⁷⁴Maj. 'Adliyyah, article 642.

⁷⁵Maj. 'Adliyyah, article 656. In this event he can ask for other collateral security, and if both securities are not fulfilled, the authority may prevent the debtor from travelling. See *Durar*, vol.I, p.691.

⁷⁶Sh. Atāsī, vol.III, p.70.

⁷⁷Ibn Khaldūn, *The Muqaddimah* [An Introduction to History] translated rom Arabic by Franz Rosenthal, Princeton Univ. Press, vol.II, p.342

The majority of jurists⁷⁸ said that a *kafālah* contract will give the favoured party a right (*ḥaqq*) to claim from the guarantor what he is entitled to. This right, nevertheless, will not relinquish the right of the creditor to claim from the debtor. He can claim from anyone he wishes, or both provided that the claim is within the extent of his entitlement.

The standpoint of the Māliki school is demonstrated in a statement by al-Dardīr :

"The guarantor (*dāmin*) should not be demanded i.e [it is not proper for] the owner of the debt (*rabb al-dayn*) to claim from him [if collecting it is problem-free] from the property of the debtor as he is in sound financial standing (*mūsir*) and not acting unjustly. This is what Mālik was referring to (as a qualification) of his saying : the owner of the debt is free to claim from either person, even if the debtor is not around (*ghā'ib*) so long as the debt is established (*thābit*) and the debtor's property is available (*ḥādir*) and [the debt] can be taken from the property of it without difficulty. However, [it is different] if it is stipulated in the contract of *damān* that he wishes to claim from the surety or there is a term saying that taking from the surety is preferred..."⁷⁹

Some jurists held that the liability for paying the debt will not shift from the *dhimmah* of the guaranteed person to the guarantor. Instead, both *dhimmahs* will jointly undertake the liability. In that situation, claim (*muṭālabah*) can be made from anyone of the two parties. The Ḥanafīs, however, ruled that the liability will be on the guaranteed person, but the creditor can make his claim from either person. This issue has been debated among the jurists, whether or not the principal debtor (*aṣl*) will be released from the obligation.

"The person claiming under the guarantee has the option to claim either against the guarantor or against the principal debtor. The

⁷⁸Among others are Sufyān al-Thawrī, Awzā'ī, Abū 'Ubayd and the three imāms Abū Ḥanīfah, Shāfi'ī and Ahmad bin Ḥanbal. See Ibn Ḥazm al-Andalusī, *al-Muḥalla*, vol.III, p.526.

⁷⁹Al-Dardīr, *al-Sharḥ al-Ṣaghīr bi Ḥamish Bulghat al-Sālik*, vol.II, p.105.

exercise of his right against the one in no way destroys his right of claiming from the other. He may claim first from the one and then from the other or from both simultaneously."⁸⁰

Shāfiʿī is of the opinion that a *kafālah* with a condition for release of the principal from liability is not permitted because it is a condition which contradicted the exigency (*muqtaḍā*) of *ḍamān*.⁸¹ Mālik was reported to have said : "The debtor cannot claim from the *kafil* except when claiming from the guaranteed person has become impossible". He stresses that *ḍamān* is a security (*wathīqah*), the satisfaction of the obligation will not be demanded from the surety except when the *aṣīl* has failed in doing so. It seems that the two earlier opinions are of the same philosophy with some variation in the details.

Ibn Abī Laylā, Ibn Shubrimah, Ibn Sīrīn, the Zāhirīs and the Imāmiyyah held that *kafālah* necessitates the release (*barāʾah*) of the *aṣīl* from liability, and the liability will transfer to the *dhimmah* of the *kafil*. The creditor primarily, has no right to claim to the *aṣīl* as in the case of *hawālah* (transfer of obligation). They argued on the authority of Abū Qatādah case, wherein the Prophet has addressed him after he paid the debt of the deceased: "May Allāh reward you with His blessings and liberate your pledge (in the same way) you have freed the liability of your fellow brother."⁸² They argued that this is an evidence the *maḍmūn* *ʿanhu* is being released from liability.

The predominant view is *kafālah* will not give rise to *barāʾah* of the guaranteed person. *Kafālah* is the fusion of the *dhimmah* of a person to another in

⁸⁰*Maj. ʿAdliyyah*, article 644.

⁸¹*Muhaddhab*, vol.I, p.415; *M.Muhtāj*, vol.II, p.207.

⁸²Ibn Hajar said that the authority of this ḥadīth is rather weak. It has been verified that it is only a narration of a story about Abū Qatādah.

the sense of *muṭālabah* and *barā'ah* is contrary to it. If *kafālah* is for the purpose of releasing one's liability, it is then *hawālah*. They are both of different nature as evident from the names, eventhough there are some similarities in between them. They quoted the ḥadīth of the Prophet : "The soul of a faithful is adjoining to his [liability] until he satisfy it"⁸³ as well as the saying of the Prophet in the case of Abū Qatādah, after knowing that the debt has been paid: "Now, you have soothed his suffering"⁸⁴ The willingness of the Prophet to offer prayers to the corpse of the deceased debtor is because *ḍamān* has served the purpose of satisfaction (*wafā'*), whereas his refusal to do the same is because *wafā'* has not being fulfilled. This shows that the liability remains on the *aṣl*.

The second legal consequence, is the establishment of right for the *kafīl* to claim from the person under guarantee. If a claim has been made to the *kafīl* and he has paid for, he can demand reimbursement of the amount paid for the liability from the guaranteed person. This right is absolute, regardless of whether the guarantee was given upon request or without the knowledge and consent of the debtor.⁸⁵

Scholars from the Shāfi'ī school of law insert a clause that the *kafīl* can only be reimbursed if the guaranteed person consented on both the guarantee (*ḍamān*) and repayment(*adā'*). Otherwise, the guaranteed person is not responsible to reimburse him. If the consent is only pertaining to the actual *ḍamān* and there was

⁸³ Al-Suyūṭī, *al-Jāmi' al-Ṣaghīr*, vol.II, p.188 ; Also see *Majma' al-Zawā'id* quoted in *Fiqh Islāmī*, vol.IV, p.129.

⁸⁴ In one report the word *jildatahū* is read as *jildihi* that is in the riwāyat of Jābir b. 'Abd Allāh. There is also a report that replaced the word *jildatahū* with *qabrahū* meaning that he will be resting in his grave with peace after the obligation has been released from his liability. See Ibn Hajar, *Fath al-Bāri*, vol.IV, pp.474-475.

⁸⁵ Al-Marghīnānī, *al-Hidāyah*, vol. VI, p.299.

nothing on repayment (*adā'*), the surety can still reimburse on the basis the loss has been sustained (*ghurm*) and thus liability falls on the principal debtor. *Adā'* alone, without invoking loss, is insufficient to grant reimbursement because it does not invoke the cause for *gharam* is not fulfilled.⁸⁶

Al-Buhutī from the Ḥanbalī school said that determining factor will be the *kafīl*'s intention (*niyyah*) while paying. If he paid the debt gratuitously (*mutabarri'an*) he cannot claim anything. If he has an intention to realize the amount he paid, he can do so even if the *ḍamān* and *qaḍā'* are without consent.⁸⁷

The legal consequences will also depend on the nature of *kafālah* contract itself, whether it is unconditional, conditional or suretyship for future undertakings. In the case of an unconditional contract of guarantee, the sum guaranteed may be claimed forthwith if the debt is payable immediately by the debtor, and upon expiration of the period prescribed for payment, if payable at some future date.

"The result of this term is a condition (*ta'līq*) which will prevent the person subjected to it from (acquiring) the cause (*sabab*) of the effectiveness of the legal ruling. *Ta'līq*, therefore, has restrained *kafālah* from becoming a cause for its legal consequence, that is right of claim (*muṭālabah*) instantly (*fī 'l-ḥāl*) and has postponed it until the condition (*shart*) becomes available...In contrast, attaching the *kafālah* to a future date like: I will guarantee the price of what you will be buying from him, as the cause for the execution of the law is fulfilled. Here, the *ta'līq* which is a preclusion to establish a causal relationship, is absent."⁸⁸

However, if the guarantee is concluded subject to a condition, or is to take effect at some future date, the guarantor may not be called upon to make payment

⁸⁶ *Umm*, vol.III, p.230.

⁸⁷ Al-Buhutī, *Kashshāf al-Qinā' 'an Matn al-Iqnā'*, vol.II, p145.

⁸⁸ *Sh. Atāsī*, vol.III, pp.35-37.

until the condition has been fulfilled and the time has arrived. In a contingent guarantee, the guarantor may not be called upon for payment should any person prove that he is entitled to the thing sold, until the court has given judgement for the return of the price to the vendor. In cases of guarantee of limited duration, no demand may be made from the guarantor except during the period of the guarantee.⁸⁹

2.7 Termination of Kafālah.

A *kafālah* contract and its legal consequences will come to an end by the occurrence of certain causes, as prescribed by the law. It will, however, as in the preceding discussion, depends on the nature of the *kafālah* itself.

In the case of *kafālah bi 'l-māl*, there are two ways by which the contract will be terminated. Firstly, repayment (*adā'*) of the debt to the creditor or at least, what is constructed as repayment or satisfaction of it (*mā fī ma'nā al-adā'*). It is immaterial whether the satisfaction is by the principal debtor (*aṣīl*) or the surety (*kafīl*). The right for demanding the given loan by the law is a way leading to repayment and if that ends up with the fulfillment of the liability, then the purpose of *kafālah* is accomplished. Therefore, the *ḥukm* (legal value) of that contract comes to an end.⁹⁰

Kafālah will also end when the creditor (*dā'in*) gives away the right of his property to either the principal debtor or the surety. A gift (*hibah*) is equal to *adā'*.

⁸⁹For details see *Sh. Atāsī*, pp.38-45. Also see *Maj. 'Adliyyah*, arts. 634 - 639.

⁹⁰*Fiqh Islāmī*, vol.V, p.152.

Another example is “something constructed and considered as *adā*” is when a creditor dies and either the principal debtor or the surety is a beneficiary to the estate left by him. By inheritance (*mīrāth*), he owns the liability which was suppose to falls on him. If the beneficiary is the surety (*kaḥl*), the suretyship to the creditor is no longer relevant. If, on the other hand, the beneficiary is the guaranteed person (*makḥl ‘anhu*), the suretyship is longer relevant.⁹¹

Secondly, the contract of *kaḥlah bi ‘l-māl* is terminated by way of *ibrā’* (release) or what is considered as *ibrā’*. If a creditor released (*abra’a*) the surety or the principal debtor, *kaḥlah* will ends. However, the release of the *kaḥl* will not necessitate release of *aḥl*. However, the release of the *aḥl* will also apply to the *kaḥl*. The debt is on the *aḥl* and not the *kaḥl* and therefore, the release of *aḥl* will drop the liability from his *dhimmah*. Consequently, the right to demand from the *kaḥl* is waived by virtue of the maxim : "If the root (*aḥl*) is waived, so is its subsidiary (*far’*).⁹²

The release of the *kaḥl* is a release from the claim against him (*muṭālahah*) not the debt (*dayn*), as there is no debt on his part. The waiving of the right of *muṭālahah* against the surety will not, therefore, waive the liability of the debtor. A legal maxim reads: “The waiving of the liability of the subsidiary (*far’*) does not waive the right of claim against the principal debtor (*aḥl*).”⁹³

⁹¹*Badā’i*, vol. VI, p.11; Also see *Majma’*, p.274.

⁹²Al-Ḥamawī, *Ghamz al-‘Uyūn al-Baṣā’ir*, vol. IX, p.91. For conditions of *ibrā’* see *Maj. ‘Adliyyah*, arts.1561-1571.

⁹³*Maj. ‘Adliyyah*, art.50 which reads: *idhā saqaṭa ‘l-aḥl saqaṭa ‘l-far’*. Cf. arts.1530, 1527, 662 and 760. See also *Sh. Bāz*, vol. I, p.40.

Ibrā' can be executed in a number of ways, among others, by the statement of the creditor (*dā'in*) to either the debtor or to the surety like the statement: "I give the waiver (and the obligation is now on me)".⁹⁴ The *ibrā'* is given as it is an admission (*iqrār*) for either holding of property (*qabḍ*) or satisfaction (*istifā'*). By saying that, he has made himself the undertaker of the waiver he made. As a result, both *kafīl* and *aṣīl* are released as the process of *ibrā'* is equal to satisfaction which requires release of both of them.⁹⁵

On a same ground, if the surety or the principal debtor, transferred the liability to a third party by way of *hawālah*⁹⁶ and the third party (*muḥāl*) agrees to undertake it, *kafālah* can be ended. *Hawālah* is a method by which *ibrā'* can be attained, involving both the debt (*dayn*) and right of claim (*muṭālabah*).

Kafālah contract can also be terminated through *ṣulḥ* (amicable settlement) in the sense that the *kafīl* makes a settlement with the creditor pertaining to the subjects of his claim. By that, the surety and principal debtor can be released in one of the two situations: namely, that he said "the guaranteed person (*makfūl 'anhu*) and myself are released from the remainder of the debt" and "I wish to make settlement with you on this matter" without putting forward any condition of release.⁹⁷

⁹⁴ *Maj. 'Adliyyah*, art.1561 reads: "If any person states that he has no claim against or dispute with some other person or that he is not entitled to anything from him, or that he has finished or given up a claim he had against him, or that he has received complete satisfaction from him, he is considered to have released such person."

⁹⁵ Cf. *Maj. 'Adliyyah*, art.1536 defined *ibra isqāṭ* as dropping of all claims and *ibrā' istifā'* is a kind of admission consisting of someone admitting he has received his right from another person.

⁹⁶ A. Dietrich, "Hawāla," *El*(2), vol.III, p.283; *Maj. 'Adliyyah*, art.673; *Maj. Shar' iyyah*, art.1155.

⁹⁷ *Maj. 'Adliyyah*, art.1531; *Maj. Shar' iyyah*, art.1616.

In the case of *kafālah bi 'l-nafs*, there are three grounds for release⁹⁸, namely handing over (*taslīm al-nafs*) the person guaranteed, release (*ibrā'*) and death. As regards the guarantee to produce the particular person, it was said:

"Upon the guarantor producing the person whose appearance was guaranteed to the person in whose favour the guarantee was given in a place where it is possible to take legal proceedings, such as a town or township, he is released from the contract of guarantee, whether such person agrees or not. If it has been stipulated that he shall deliver him in some specified town, however, and he delivers him elsewhere, he is not released from the contract of guarantee. If he has agreed to produce him in court, but hands him over in the street, he is not freed from the contract of guarantee. If he hands him over in the presence of a police officer, however, he is released from the guarantee."⁹⁹

The important criterion for this matter is the viability of instituting legal action (*imkān al-muḥākamah*) and that is a requirement for the cessation of the *kafālah*. Therefore, if the guaranteed is delivered in a place wherein legal action is impossible, like in a place where a judicial authority and its supporting staffs are unavailable, release of the guarantor cannot be granted.¹⁰⁰

Ibrā' is also a ground for release in this type of guarantee. This is when the creditor releases the guarantor from the *kafālah* contract. If that is granted, the *kafālah* contract is ended because the objective of *kafālah* is establishing right of *muṭālabah* and if that right is being dropped, the legal effect will cease accordingly. In this circumstance, the *aṣīl* is not exempted from liability as the release (*ibrā'*) is for the *kaṭl* not the *aṣīl*. Should *ibrā'* be granted for the *aṣīl*, both the parties will be exempted.¹⁰¹

⁹⁸*Badā'i*, vol.VI, p.12 ; *Mabsūṭ*, vol.XIX, p.166; Ibn Humam, *Fatḥ al-Qadīr*, vol.V, p.393 ; *Majma'*, p.266 and 274.

⁹⁹*Maj. 'Adliyyah*, Article 663.

¹⁰⁰*Naz. Ḍamān*, p.154.

¹⁰¹*Naz. Ḍamān*, p.155.

The third ground for termination of *kafālah bi 'l-nafs* is the death of the *aşıl* (principal debtor). In this situation, making the *aşıl* has become impossible and the obligation is then released from him. On the same basis, if the guarantor dies, he is released from the obligation. Should the person in whose favour the guarantee was given died, however, the guarantor is not released from the contract of guarantee, and a claim may be made by such person's heirs.¹⁰²

2.8 Transfer of Obligation : Comparison between Kafālah and Hawālah.

Hawālah is a way of extinguishing an obligation by transforming it into a new one. *Hawālah*, literally, implies transfer. Legally, *hawālah* is an agreement by which a debtor is freed from a debt by another becoming responsible for it or transfer of a claim of a debt by shifting the responsibility from one to another.

"The Ḥanafīs ruled that *hawālah* is transfer of right of claim (*muṭālabah*) from the *dhimmaḥ* of the debtor (*madīn*) to the *dhimmaḥ* of an assignee (*multazim*). In that respect, it differs from *kafālah* as it involves fusion (*ḍamm*) of liability in the process of claim (*muṭālabah*) and not a transfer. In in *hawālah* deal, the debtor (*madīn*) will not be demanded after the contract is concluded. It is said in manuals of this school that *hawālah* is shifting (*taḥwīl*) of a debt from the liability of principal debtor to that of a delegated payer (*muhāl 'alayh*) as a mean of security (*tawaththuq*). *Hawālah* is a contract permissible in all debts (*duyūn*) but not in goods (*a'yān*). It is founded on constructive transfer (*naql ḥukmī*) not physical."¹⁰³

¹⁰²*Maj. 'Adliyyah*, Article 666. Regarding *murūr al-zaman* (lapse of time) it was ruled that: "A right is not abrogated by the lapse of time for an action to be heard." See *Maj. 'Adliyyah*, art.1673 and 1660; *Murshid*, art.256; *Maj. Shar'iyah*, art.2051; *Kafālah*, pp.127-128.

¹⁰³*Mughnī*, vol.IV, p.83; *Naz. Ḍamān*, p.163.

The legal evidence for that is the ḥadīth of the Prophet pertaining to the obligation to repay one's debt:

" Procrastination in paying debt by a wealthy man is injustice. So if your debt is transferred from your debtor to a trustworthy rich debtor (*malī'*), you should agree."¹⁰⁴

This ḥadīth indicates that the order of the Prophet to accept *ḥawālah* by a rich debtor is a recommendation, as was held by majority of jurists. This contract is considered as a worldly beneficial matter and therefore considered as performance of good deed (*iḥsān*) to the debtor. By doing this, he will release the debtor from his legal obligation for the debt.¹⁰⁵

No matter how diversified *kafālah* and *ḥawālah* may be, there are many points of similarity in between them and they can, to some extent, become complementary to each other insofar as settlement of loans are concerned. As *kafālah* in its modern usage became extended to new transactions, so did *ḥawālah*.

"The law has ordered giving security for debts (*tawthīq al-duyūn*) for variety of purposes like protection of rights, avoiding disputes (*nizā'*), guarantee (*ḍamān*) for payment of the debt and the creditor's right of priority over the estate of the debtor with others possessing such a right. Methods of security rest in, among others, the documentation of the loan (*kitābah*), certification of a notary (*shahādah*), pledge (*rahn*), transfer of obligation (*ḥawālah*) and guarantee (*kafālah*).¹⁰⁶

It is suggested that the availability of the institution of *ḥawālah* has extended a great deal of facilities to cope with the burden of commercial transac-

¹⁰⁴Al-Mundharī, *Mukhtaṣar Saḥīḥ Muslim*, vol.II, p.15 cited in *Fī'l Ḍār*, p.27.

¹⁰⁵*Qawā'id Ahkām*, p.160.

¹⁰⁶Muḥammad Aḥmad Sarraj, *al-Awrāq al-Tijāriyyah fī 'l-Sharī'ah al-Islāmiyyah*, Cairo, 1988, p.82.

tions and their diversified practices. It can provide new ways of satisfaction of debt and giving security which correspond to the currently used negotiable instruments. Lieber observed that one of the greatest contributions of the Muslim world to medieval economic life was the development of commercial methods based on writing and recording.¹⁰⁷ Some contemporary Islamic scholars¹⁰⁸ and economists have made an attempt to prove that the notion of *kafālah* and *ḍamān* has been used the legal vehicle for the practice of letter of credit (*khiṭāb al-ḍamān*)¹⁰⁹, letters of credit, promissory notes and others. Even if these instruments the elements of other concepts of Islamic transactions, the role of *kafālah* is recognized. Regarding the function of a bill of exchange, Lieber quoted a description by Firuzabādī in Grasshoff's work that a *suftajah* functions in giving capital to somebody, who has capital in the hand of the giver, who thus profits from the security of the way.¹¹⁰

2.9 Islamic Rules on Insolvency.

As a related subject, discussion on loan contracts should also incorporate the topic on insolvency. *Iflās* has been used in the literal sense to denote a state of indigence or destitution and lack of obtainment. When a person is being pronounced as a *muflis*, in the common legal acceptance, it is meant for bankruptcy or

¹⁰⁷A.Lieber, "Eastern Business Practices and Medieval European Commerce," *Economic History Review* vol.21, No.2 [August 1968], p.231.

¹⁰⁸*Kafālah*, p.132.

¹⁰⁹See *al-Mawsū'ah al-'Ilmiyyah wa 'l-'Amaliyyah li 'l-Bunūk al-Islāmiyyah*, vol.II, pp.309-337 cited in *Kafālah*, p.132.

¹¹⁰A.Lieber, op.cit., p.233. For details see 'Alī Aḥmad al-Sālūs, *al-Mu'āmalāt al-Māliyyah fī Daw' al-Sharī'ah al-Islāmiyyah*, 1986; 'Isā 'Abduh, *al-'Uqud al-Shar'iyyah al-Ḥākimah li 'l-Mu'āmalāt al-Māliyyah al-Mu'āṣirah*, 1977. Cf. on negotiable instruments R.M.Goode, *Commercial Law*, pp.427-428.

insolvency.¹¹¹ Bankruptcy is the judicially decreed forfeiture of the debtor's property in favour of his creditors, which arises owing to his inability to discharge his obligations.¹¹² A bankrupt is reduced to complete indigence because his debts exceed the value of his property, upon the demand of his creditors.¹¹³

Every creditor can, by law, prevent his debtor, whose debts are greater than his assets from gratuitously alienating any of his property or even to leave on journey if his debt would fall due during his absence. This process is known as *ḥajr* (interdiction) in Islamic law. However, this can only be operative when the creditor makes a demand for bankruptcy to be declared.¹¹⁴ The main reason for bankruptcy is *iflās ḥaqiqī*¹¹⁵ or to some simply *iflāscholar iflās ḡāhir wa 'l-mumāṭalah*.¹¹⁶

A bankruptcy order will deprive the bankrupt of the right of managing his property, though some restricted that to mere dispositions of property which is

¹¹¹*Lexicon*, vol.II, p.2440.

¹¹²*Mukhtaṣar*, p.177. On this matter, Ruxton quoted a note by Zeys in his *Recueil d'Actes et de Jugements* (Agiers, 1886) stating that the word *falas* would be best rendered as 'insolvency judicially declared'. The term bankruptcy has, however, been used for the sake of brevity.

¹¹³*Minḥāj*, p.161.

¹¹⁴The Majallah adopted the opinion of Abū Yūsuf and al-Shaybānī that the Ruler may impose interdiction on the debtors based on the demand of the creditors [*li 'l-ḥākim an yaḥjur 'ala 'l-madyūn bi ṭalab al-ghuramā'*]. *Maj. 'Adliyyah*, art.959. This has been generally accepted by the majority of jurists except Shāfi'ī who allows *ḥajr* to be imposed before it was demanded for and he even allowed it if *ḥajr* is demanded by the debtor himself. See *Mūjabāt*, p.403.

¹¹⁵It is a situation wherein the property of the debtor is less than his debt. If it is at par, the majority of jurists ruled that there is no case for *ḥajr* yet. *Muhadhdhab*, vol.I, p.321; *Mughnī*, vol.IV, p.327. The Majallah, however, ruled that even if the property is equivalent to the debt, let alone if more, the creditor can demand imposition of *ḥajr*, fearing that the debtor will lose the property through business, hide it or change its title to another person. See *Maj. 'Adliyyah*, art.999; 'Abd al-Ghaffār Ibrāhīm Sāliḥ, *al-Iflās fī al-Sharī'ah al-Islāmiyyah*, 1980.

¹¹⁶*Māṭil al-dayn* is a debtor who delayed payment though he is able to do it. He is, apparently, like a *muflis*. Therefore, some scholars opined that in this situation, the creditor can demand for a bankruptcy order. This is based on the ḥadīth that : delay [in payment of debt] by a well-off debtor is injustice and such is consonant with the philosophy of Islamic law. See al-'Aynī, *'Umdat al-Qāri'*, vol.XII, p.236; *Maj. 'Adliyyah*, art.998; *Mūjabāt*, p.404.

detrimental to the creditors.¹¹⁷ However, bankruptcy leaves intact purely personal rights, such as legal capacity to marry, to repudiate or divorce a wife, to claim an application of the law of talion (*qiṣāṣ*) or to grant pardon in accordance with it.¹¹⁸ Concerning commercial transactions, a bankrupt can, of his own accord, return goods he just bought on account of redhibitory defects, if such redhibitory profits the estate.¹¹⁹

After the declaration of bankruptcy, the court should hasten to sell the bankrupt's property and distribute the proceeds amongst the creditors. Abu Ḥanifah strongly disapproves the imposition of *ḥajr* as that would nullify his capacity and this would cause him serious injury. Selling off his property in that manner would contradict the ruling on "trading with consent"¹²⁰ and trading with "the owner's covet"¹²¹. The majority of jurists including Mālik, Shāfiʿī, Ibn Ḥanbal, disciples of Abū Ḥanīfah Abū Yūsuf and Muḥammad al-Shaybānī sanctioned the imposition of *ḥajr* on the debtor and selling off his property for settlement thereof. This stance is based on the precedence of the Prophet who had imposed *ḥajr* and selling off the

¹¹⁷ *Mughnī*, vol.IV, p.489; Ibn Rushd, *Bidāyat al-Mujtahid*, vol.II, p.237; *Wajīz*, vol.I, p.170. *Maj.ʿAdliyyah*, art.1002 reads : The interdiction applies to anything likely to destroy the right of creditors, such as making gifts and bestowing alms and selling property at less than market value. Consequently, any contracts entered into by a bankrupt debtor which are prejudicial to the right of the creditors and other dispositions of property and gifts, are invalid in respect of the property which existed at the time the interdiction was pronounced.

¹¹⁸ *Ibid.*, pp.161-162. See also *Mukhtaṣar*, p.178.

¹¹⁹ *Ibid.*, p.162.

¹²⁰ *Q.*, al-Nisā' (4) : 29.

¹²¹ Based on a ḥadīth reads : The property of a Muslim may not be legally (transferable) except with his consent and freewill, cited in *Mūjabāt*, p.403. This stance by Abū Ḥanīfah was shared by his student Zufar and the Zāhirī school. See Ibn Nujaym, *al-Baḥr al-Rāʾiq*, vol.VIII, p.83; *Maṣādir*, vol.V, pp.99-106.

property of Mu‘ādh b. Jabal as well as decisions by ‘Umar b. al-Khaṭṭāb and ‘Umar b. ‘Abd al-‘Azīz on the same matter.¹²²

Some scholars argued that the parameter used to determine the viability of the bankruptcy regulations in Islam is the doctrine of *maṣlahah*. In this respect, Ibn ‘Abd al-Salām remarked:

“ An interdiction order against a *muflis* is a mayhem on his rights. Nevertheless, it has become an acceptable norm (*thabata*) that such mayhem is overruled by the *maṣlahah* of the creditors (*ghuramā*). If you like, you can say that the interest of the creditor is given priority over the interest of the debtor. Contrarily, his interest as regards maintenance of himself and his dependence [from the day bankruptcy is declared] until the debt is paid. Therefore, the interest of the debtor as regards to maintenance [of himself and his dependants] is given priority over the interest of the creditors.”¹²³

There appears to be an agreement between schools of law, as regards the imposition of *ḥajr*, based on the demand of the creditors. It must be by court order, properly witnessed and notified so as to avoid people from any dealing with the bankrupt.¹²⁴ The *Shari‘ah* also requires equal treatment amongst the creditors, as the proceed from the sale of the debtor’s property will be divided between them proportionally.

¹²²Details on the debate of this matters see *Mabsūt*, vol.XXIV, p.163ff; *Badā‘i‘*, vol.VII, p.169; Mālik b. Anas, *al-Mudawwanah al-Kubrā*, vol.XIII, p.83ff; Ibn Rushd, *Bidāyat al-Mujtahid*, vol.II, pp.235-243; *Qawānīn*, p.318; *Umm*, vol.III, pp.189-191; *Wajīz*, vol.I, *Muhadhdhab*, vol.I, p.320; *Mughnī*, vol.IV, p.455ff. Ṣubḥī Maḥmaṣṣānī notes that majority of modern legislation had set regulations on bankruptcy and interdiction. However, some laws restrict the imposition to the traders only as in France and Lebanon whereas Islamic and English law does not make any distinction between traders or other classes of people. See *Mūjabāt*, p.403.

¹²³*Qawā‘id Ahkām*, p.105. Provisions on the right of a bankrupt to his basic needs see *Maj.‘Adliyyah*, arts.999-1000.

¹²⁴*Maṣādir*, vol.V, p.137.

Conclusion

This chapter has identified an extensive role of *ḍamān* in the sense of suretyship for the smooth operation of business activities. The personal guarantee needed by some merchant could be used individually or in conjunction with other methods of security. The usage of more than one means of security is an extra precaution resorted to by the merchant especially where long-distance and international trade are involved. The contribution of the Islamic civilization to the various commercial techniques like the negotiable instruments are established.

CHAPTER THREE

DAMĀN ARISING FROM CONTRACTUAL LIABILITY

“ People stand in need of trade, gift and hire and other practices in their economic life in the same way they need food, drink and clothing. The *Shari‘ah* has laid down proper guidelines for these practices. Thus it has forbidden such practices as are corrupt and enjoined those that are desirable....from this it follows that people may engage in trade and hire in whatever manner they like, so long as the *Shari‘ah* does not forbid it.”

[Ibn Taimiyah, *Majmū‘ Fatāwā*, vol.IXX, p.18]

Ḍamān in the sense of *gharāmah* is another important purpose of its application in commerce. The term has been used universally at all stages on the contractual relationship, despite it is contextual. During the conclusion of the deal, *Ḍamān* provides an effective warranty against any physical imperfection, lack of the standard quality or even defect in ownership. When the defect is being found, *Ḍamān* is the available remedy by allowing the affected party to exercise his right of option. If any party is found to have committed a civil wrong resulted in the other party suffering loss, *Ḍamān* is the compensatory measure to be applied.

This chapter seeks to examine this aspect of *Ḍamān* which will evolve around various Islamic nominate contracts. However, only contracts with a commercial element, in the Western sense, will be discussed, whereas those which are not strictly of that nature will be omitted.

It is obvious that contract (*‘aqd*) has been treated in a special manner by the *fuqaha*’ (jurists) in their legal manuals. Discussion of contract has occupied a substantial part of fiqh literature, being one of the most important sources of obligation (*maṣḍar li inshā’ al-iltizām*), whether involving debt (*dayn*), goods (*‘ayn*), performance of task (*‘amal*) as well as giving security (*tawthīq*).¹

In *Murshid al-Ḥayrān*², *‘aqd* is defined as the connection (*irtibāt*) between an offer (*ījāb*) from one of the contracting parties and the acceptance (*qabūl*) by the other party, which will give rise to a legal consequence (*athar*) on the subject-matter of the contract. As a result of this legal relationship, each of the contracting parties will have an undertaking that has to be discharged and thus form an obligation on his *dhimmah*. Even though there have been widespread claims that the general theory of contract is not available in the classical sources of Islamic law, the subject has been treated on the basis of individual nominate contracts (*‘uqūd musammāh*), recent writings of contemporary jurists³ have tried to prove otherwise. The departure in the style of writing fiqh, by adopting new styles and approaches⁴, for contemporary audiences has witnessed the crystallization of the general theory of contract. The availability of a general theory will allow an easier and systematic treatment of *ḍamān* in relation to contractual relationships.

¹*Maṣādir*, vol.I, p.40.

²Article 262. Also see *Maj. ‘Adliyyah*, art.101.

³This is exemplified in Muṣṭafa Zarqā’s *Madkhal* and his other recent work like *Fi’l Dār* as well as books by Wahbah al-Zuhaylī such as *Fiqh Islāmī* and his analysis on the extent of *fiqh*’s influence in the Jordanian and UAE civil codes, *‘Uqūd Musammāh*.

⁴A comparative approach (*muqāranah*) is very important in the process of enhancing a better understanding of each other’s legal system. The Muslim jurists, instead, have tried their best to present *fiqh* using a simple and straight-forward expression, rather than using the classical Arabic which is accessible to a limited number of people.

As regards the application of *ḍamān*, *‘aqd* is one of the most important ground. Muḥammad Fawzī Fayḍ Allāh has classified grounds for *ḍamān* into three categories, namely ruling by the law giver (*ilzām al-Shāri‘*), liabilities arising from contract (*iltizām bi ‘l-‘aqd*) and invoking harm and injury (*iḍrār*). This chapter will concentrate on *ḍamān* within the ambit of contractual liability. The first category will be completely omitted as it pertains directly to rituals (*‘ibādāt*), whereas the third category will be treated in some respect involving some injurious acts but strictly within the scope of commerce rather than on the premise of the law of torts (*mas’ūliyyat taqṣīriyyah*)⁵

In the course of analysing the manner how *ḍamān* is being applied, it is pertinent to look at the division of contracts. There are four divisions: Firstly, a contract designated to grant *ḍamān* by itself. It is the contract of suretyship which has been treated in the preceding chapter. Secondly, the contract which is not for the purpose of *ḍamān* but for transfer of ownership and gaining profit. Nevertheless, *ḍamān* will be an inherent effect (*athar lāzim*) of the contract. This is known as *‘uqūd ḍamān* in the sense that the holder (*al-qābiḍ*) of the property will be liable should any damage occur. Thirdly, is the contract wherein the notion of trust (*amānah*) is the basic motive with profit (*ribḥ*) occasionally becoming an accompanying motive. This is called *‘uqūd amānah* in the sense that holding the property hold on the holder, as he will not be held responsible in the event of damage unless he is negligent. Fourthly, is the contract with both prescriptions. On the one hand *ḍamān* arises, and *amānah* on the other. It is *‘uqūd muzdawajat al-athar* based on its attributes.⁶

⁵. *Naz. Ḍamān ‘Āmm*, pp.21-70. Also see *Fi’l Dār*, pp.15-67.

⁶. *Naz. Ḍamān*, p.144. This idea is adopted from a modern classification by Muṣṭafā Aḥmad Zarqā’ known as "*taṣnīf al-‘uqūd bi ‘l-naẓar ilā al-ḍamān wa ‘adamihi*" [classification of contracts on the basis on application of *ḍamān* or otherwise]. See *Madkhal* vol.I, pp.579-582.

In order to distinguish the three divisions of contract in relation to *ḍamān*, one must look at the nature of the contract. The distinguishing factor is whether it is a commutative contract (*mu'āwadah*) or otherwise.

“The determining factor in differentiating ‘*aqd ḍamān* and ‘*aqd amānah* is *mu'āwadah*. If the motive (*qaṣd*) from the contract is *mu'āwadah* [a contract wherein each party will give equal benefit as did the other party]⁷ it is ‘*aqd ḍamān*, otherwise it is ‘*aqd amānah*.”⁸

PART ONE : ḌAMĀN AS A CONTRACTUAL LIABILITY

‘*Aqd ḍamān* is the agreement whereby a person holding the property, as a result of transfer of ownership arising from a soundly concluded contract, will be liable for any damage to the said property. This liability is imposed regardless whether the destruction is caused by the holder himself, or by others or even by misfortune (*āfat samāwiyyah*). The main focus would be the contract of *bay'* (sale) as it is the most important form of transaction. The notion of contractual liability (*mas'ūliyyat 'aqdiyyah*) can be discussed from three angles, namely contractual wrong (*khata' 'aqdī*), injury (*ḍarar*) and causal relationship between wrong and injury. Contractual wrong is a situation whereby the obligor did not perform his obligation, whether intentionally, out of carelessness or otherwise.

⁷. Muḥammad Rawās Qal'ahjī and Ḥāmid Ṣādiq Qanībī, *Mu'jam Lughat al-Fuqahā'*, Dar al-Nafā'is, Beyrut, 1985, p.438.

⁸. *Naz.Ḍamān 'Āmm*, p.26. Cf. *Madkhal* p.231. Muṣṭafā Zarqā' said: “The Sharī'ah principle applicable to distinguish between ‘*uqūd al-ḍamānāt* and ‘*uqūd al-amānāt* is the element of *mu'āwadah*. If the element of *mu'āwadah* can be established, then the holder of the property is a *ḍāmin*. Otherwise, he is in a position of a trust (*amānah*).” The outcome of this principle is the three classes of contract as far as *ḍamān* is concerned.

As regards contractual wrong, al-Sanhūrī said that the question of performance of contract can be viewed from two perspectives. Firstly, the obligation of the contracting parties to accomplish certain goals (*al-iltizām bi taḥqīq ghāyah*) such as obligation to transfer of title, transfer of usufruct, goods and others. Secondly, the obligation to perform a task (*al-iltizām bi badhl ‘ināyah*) like responsibility to safeguard the property of a *wadī‘ah* (deposit), *ijārah* (lease), *i‘ārah* (lending) and others.⁹

3.1 Ḍamān in Bay‘ (Sale of Goods)

In the case of sale, *ḍamān* is an important basis in discussion on destruction of the object of sale (*halāk al-mabī‘*). It is a commutative contract (*mu‘āwadah*) in which reliance on the protection of *ḍamān* is essential. Once there is an exchange of possession (*qabḍ*) of the goods and payment, *ḍamān* will be established for the purpose of payment (*istifā‘*) or restitution (*istihqāq al-‘iwad*) arising from it. The scope of the subject of *ḍamān al-mabī‘* (liability pertaining to object of sale) will cover an analysis of the three situations of the damage : *halāk kullī* (complete damage), *halāk juz‘ī* (partial damage) and *halāk al-namā‘* (destruction of the increment of the object of sale).¹⁰

⁹. *Maṣādir*, vol.VI, pp.138-168. In analysing these issues Sanhūrī appeared to have based his theory on the concept of *obligation de résultat* and *obligation de moyen* applicable in French law. His search for corresponding principles in Islamic law by examining classical writings like *Mabsūṭ*, *Majma‘ al-Ḍamānāt* and others, is a praiseworthy effort. In doing so, Sanhūrī himself clarified that: “It is not possible to say that there is a theory on contractual liability in Islamic law in the same manner as perceived in the Western jurisprudence. What is possible is to deduce from the Islamic legal precepts what is corresponding to the theory of *al-mas’ūliyyat al-‘aqdiyyah*.” See *Maṣādir*, vol.VI, p.138.

¹⁰. For a complete treatment of the subject see *Badā‘i‘*, vol.V, p.238; Ibn ‘Ābidīn, *Radd al-Mukhtār ‘alā Durr al-Mukhtār*, vol.IV, p.44.

Complete damage means that the *mabi'* is totally destroyed after transfer of possession (*ba'd al-qabḍ*) to the purchaser. Supposing that the destruction is caused by unavoidable natural calamity (*āfat samāwiyyah*) or caused by the buyer himself or caused by the *mabi'* itself [like an animal that kills itself] or caused by a third party - the contract of sale is not rescinded. The burden of the damage will be the purchaser's responsibility (*ḍamān al-mushtarī*). This is because the *mabi'* has already shifted from *ḍamān al-bā'i* (responsibility of the vendor) by the purchaser taking possession. The seller has obtained the price (*thaman*) and therefore *ḍamān* will go to another person in an event which might require its intervention.¹¹

However, if the destruction is caused by the seller, there are a few different situations discussed by the *fuqaha'*. If the purchaser has taken possession of the object with or without the vendor's permission, but he has paid the price or there is an agreement for delayed payment (*mu'ajjal*), the vendor is responsible for the damage. But if the purchaser took possession without the permission of the vendor and the price is due at present, the vendor has to recover the object. He is also liable for that damage in which case he must rescind the sale and return the price.

There will be a different ruling pertaining to *ḍamān* if the destruction takes place before transfer of possession. If *āfat samāwiyyah* is the cause, the contract of sale is rescinded and the due payment will be waived and *ḍamān* will fall on the

¹¹. *Naẓ Ḍamān*, p.145. Aḥmad ibn Naqīb al-Miṣrī said: "[The] merchandise is the responsibility of the vendor before the purchaser has taken possession of it. If such merchandise is destroyed by itself or through an act of the vendor, then the agreement is cancelled and no payment is due for it. If the purchaser destroys such merchandise, he must pay its price, and his destroying it is considered as having taken possession of it. If a third party destroys such merchandise, the deal is not cancelled but rather the purchaser is given a choice to either cancel the agreement or effect the deal, paying the vendor." See his, *Umdat al-Sālik* [tr. by Noah Ha Mim Keller], p.397.

vendor. The same rules apply in the case of damage caused by the *mabi'* itself or by the vendor.

If the purchaser caused the damage, the contract will remain intact and he is responsible for the payment. If the damage is caused by a third party, there is no impact on the status of the contract but the rule of *khiyār* (option) will be applied. The rule says that the purchaser can either rescind the contract or continue with it by paying the price and making a claim on the third party for *ḍamān*.

“If the thing sold is destroyed while in the possession of the vendor prior to delivery, no liability attaches to the purchaser, and the loss must be born by the vendor.¹² And if the thing sold is destroyed after delivery, no liability attaches to the vendor, and the loss must be borne by the purchaser.”¹³

The law on partial destruction is similar to that of total destruction in respect of the party liable for it (*al-mas'ūl 'anhū*). If the damage takes place before delivery (*taslīm*) the vendor is liable in the sense that a reduction of price corresponding to the damage will be granted. If the destruction takes place after delivery, the purchaser (*mushtarī*) will become liable and should pay the payment. In most situations, the common remedy will be the grant of right of *khiyār* whereby the purchaser is at liberty whether to proceed with the deal with a discounted price by virtue of the damage of terminating the transaction completely.

3.2 Destruction of the Increment of the Object of Sale.

¹². *Maj. 'Adliyyah*, Art.293

¹³. *Maj. 'Adliyyah*, art. 294.

Another important issue treated in the fiqh works, using its hypothetical approach, is the application of *ḍamān* in cases involving the destruction of the increase or growth of the property. *al-namā'* simply means increase (*ziyādah*) which happens before or after delivery. It can either be an increase attached to the property (*muttaṣil*) or independent from it (*munfaṣil*). The *ziyādah muttaṣilah* is an increase either by a congenital reason (*mutawallidah*) like beauty, size, appearance and others or a non-congenital reason such as a dyed garment or an erected building. On the other hand, *ziyādah munfaṣilah* is understood as an increase which can be congenital like offspring (*walad*), fruit (*thamarah*) and milk (*laban*) or non-congenital like dividends (*ghillah*) from investment of real estate. The Ḥanafī rule on *ḍamān* in *zawā'id* is that it is part of the object of sale by virtue of being the subordinate (*tābi'*) to the original object of the transaction except for independent non-congenital increase.¹⁴

Therefore, a vendor will shoulder the responsibility if before delivery, the *ziyādah* is destroyed by him which will consequently lead to reduction in the price, as if partial destruction has been done. If the destruction is caused by *āfat samāwiyyah* there will be no *ḍamān* as in the case of dates destroyed by storm as they are not the objective of the sale but just a consequence (*li annahā wa in kānat mabī'ah illā annahā tadhkhul fī 'l-bay' tab'an la maqṣūdan*).

In this regard, Ibn Rajab has expounded this case on the premise of a maxim: "The law of an increment (*al-namā'*) is according to the law of the original [property] in question" [*ḥukm al-namā' ḥukm al-aṣl*].¹⁵

¹⁴. *Naz. Ḍamān*, p.147.

¹⁵. See *Qawā'id*, pp.166-167.

"In the case of a contract not intended for any transfer [of ownership] involving a real property (*‘ayn*), the increment will not be subjected to any transfer whatsoever. Since the title of the *aṣl* is not shifted, the *namā’* will follow suit. However, the *namā’* will follow the *aṣl*, when there is such a provision in the contract. As such, will the rules on *ḍamān* be applied to them or not. Indeed, the contract involves transfer of corporeal property (*‘ayn*), *ḍamān* is incumbent, thus rules on *namā’* will be identical to that of *aṣl*...."

Another explanation on this matter has been dealt with by al-Suyūṭī in his *al-Ashbāh wa ’l-Nazā’ir*, wherein he quoted a maxim, originally a *ḥadīth* of the Prophet: "An advantage [drawn from a property] will correspond to the liability to retribute thereto" [*al-kharāj bi ’l-ḍamān*]. In some reports, the incident that prompted this saying was a case in which a man bought a slave who and stayed with him for some time until he detected some deficiencies in him. He then went to see the Prophet to lodge a complaint and the Prophet ruled that the slave is to be returned to his owner. The vendor argued that his slave had been deployed by the purchaser for some time. The Prophet clarified the matter by saying: *al-kharāj bi ’l-ḍamān*.

Abū ‘Ubayd interprets the word "*al-kharāj*" in the maxim as the yield of a property bought by the purchaser. The purchaser has been using the object for some time until he discovered a flaw in it and realised that he has been deceived by the vendor. He will have to return the object before getting his money back. The purchaser is allowed by the law to obtain the yield of the property by virtue of his position as the person holding the property with responsibility.

"...*al-kharāj* is what is produced by a property in form of yield (*ghillāh*), benefit (*manfa‘ah*) or object (*‘ayn*) which goes to [the favour] of the buyer in return (*‘iwāḍ*) for the burdening of *ḍamān al-milk* (liability for possession). Should the property which is in his hand suffers damage, he will be liable for restitution, and thus the

yield is the price of the liability [*fa 'l-ghillah fi muqābalat 'l-ghurm*]...."¹⁶

3.3 Ḍamān in a Void Contract

The preceding discussions on *ḍamān* in sale was on the presumption that it is a contract concluded validly according to law. Since the validity of the transaction is a basic requisite for the legal consequences to take effect, then the status of *ḍamān* in a void contract (*'aqd bāṭil*) or holding a property with intention to purchase (*al-maqbūḍ 'alā sawm al-shirā'*)¹⁷, will be examined. If the transaction is void, the legal effect cannot take place. That will likely cause to disputes and eventually, the rules on *ḍamān* is needed.

A contract is considered null and void when the basic constituent of the contract is lacking or the object of sale is not in accordance with its description. This is also explained as a contract which is invalid in both its *aṣl* and *waṣf*. It is also described as when the pillars of the contract are breached. As such, it is treated as *ghayr mun'aqid* (as though the contract has never been formed). Wahbah al-Zuhaylī has itemized *al-bay' al-bāṭil* as to include *bay' al-ma'dūm* (sale of absent object), *bay' ma'jūz al-taslīm* (sale in which the object could not be delivered), *bay' al-gharar* (sale with uncertainty) and so on, quite clearly adopting the Ḥanafī's legal manual.

¹⁶. *Ashbāh.S*, pp.93-94.

¹⁷. What meant by *al-maqbūḍ 'alā sawm al-shirā'* is the buyer is holding the property after an agreement on the price but there is no confirmation on the purchase yet. In the classical manuals it is mentioned that, the vendor told the purchaser: "Go away with the object, if you like it I will sell it to you for such a price" (*fa in raḍṭahū ishtaraituhū bi kadhā*). If it is damaged, the holder is liable for the price. Even, if there is no agreement on the price, and the holder takes the object and it is damaged, he is still responsible for the price. See Ibn Humam, *Fath al-Qadīr*, vol.V, p.187.

Al-bay' al-fāsid as recognized only in Ḥanafī law, on the other hand, is a contract which is in accordance with the law in respect of its *aṣl* not its *wasf*. This is when something in the contract other than a pillar is defective. The contract is lawful in essence but not in quality. This includes what has been treated in fiqh manuals as *bay' al-majhūl* (sale of unknown object), *bay' al-mu'allaq 'alā shart* (conditional sale), *bay' al-'ayn al-ghā'ibah* (sale of lost object), *al-bay'atān fī bay'ah* (two sales in one) and so on. These are not the only types of transactions classified as *bāṭil* and *fāsid*, as the *illah* (effective cause) can be extended to their modes of new transactions.

“There exists a scale of legal validity, the widest concept in which is *mashrū'* (recognized by the law) which corresponds with the scale. According to the degree of this correspondence, a transaction is *ṣaḥīḥ* (valid) if both its nature (*aṣl*) and its circumstances corresponds with the law; *makrūh* (reprehensible, disapproved)¹⁸, if its *aṣl* and its corresponds with the law, but something forbidden is connected with it ; *fāsid* (defective), if its *aṣl* corresponds with the law but not its *wasf* ; *bāṭil* (invalid, null, void), where *aṣl* and *wasf* did not correspond to the *rukṇ* and *shart*.....the distinction between *fāsid* and *bāṭil*, which are not recognised to the same extent, or not at all, by other schools of Islamic law, is often not clearly made ; the idea of *fāsid* comes near to that of "voidable", though it is not identical with it, and *fāsid* contracts, even if they are not voided, sometimes have only restricted legal effects. To be distinguished from the quality as *fāsid* is the right of rescission (*khiyār*), right to cancel (*faskh*) or to ratify (*imḍā'*) a contract within a stipulated time ; this right can be granted by law or stipulated by contract.”¹⁹

Pertaining to a void contract, some Ḥanafī scholars, ruled that property is a trust (*amānah*) in the hand of the purchaser. In that case, the principle of *ḍamān* in respect of a fiduciary relationship applies. He argued that the contract is void and

¹⁸. According to Wahbah al-Zuhaylī, types of transactions considered as bay' al-makrūh. Op.cit., p.147.

¹⁹. Introduction, p.121. Also see Muḥammad Ḥasanayn, *Nazariyyah Buṭlān al-'Aqd fī 'l-Fiqh al-Islāmiyy : Dirāsah Muqāranah bi 'l-Qānūn al-Waḍ'ī*, 1988.

thus does not bring about any legal effect and that will not caused *ḍamān* to be applied except if transgression (*taʿaddī*) and negligence (*taqṣīr*) can be established. This view is adopted by the Majallah al-Aḥkām al-ʿAdliyyah.²⁰

On the other hand, another group of scholars like al-Sarakhsī put forward another opinion which is derived from Abū Ḥanīfah's disciples, Abū Yūsuf and Shaybānī, and shared by the Mālikis, Shāfiʿis and Ḥanbālīs that the object of sale is a liability of the purchaser. The basic objective of the transaction is an exchange (*muʿāwāḍah*), and the rules of *muʿāwāḍah* will apply accordingly. The scholars drew an analogy between *al-bayʿ al-bāṭil* and *al-maqbūḍ ʿalā sawm al-shirāʾ*, as in the latter case *ḍamān* is imposed by unanimous opinion of the scholars.²¹

3.4 Restitution for Default of Ownership

The vendor (*bāʿi*) is liable to compensate in relation to any claim (*ḍamān al-istiḥqāq*), in most cases pertaining to ownership, as well as to provide compensation for defect (*ḍamān al-ʿayb*). Since both cases are classified as obligation for performance of an objective (*iltizām bi taḥqīq al-ghāyah*), whenever a claim (for ownership) is made or a defect in the goods is proven, the vendor will overtly become liable regardless of the reason for the claim or the defect. The non-possession of the good also will make no difference to him evading the liability.²²

²⁰. Art.370.

²¹. *Majmaʿ*, p.215 ; al-Qurāfi, *Kitāb al-Furūq*, vol.II, p.207; *Ashbāh.S.*, p.278.

²²*Maj.ʿAdliyyah*, art.670. Also see *Sh.Bāz*, vol.I, pp.369-370.

This is because his duty is to guarantee that there will be no claim of ownership to the object sold and it is free from any defect whatsoever. If either of the situation arises, the vendor is considered as abandoning his obligation and unable to perform the intended objectives of the contract. *Damān* in this case will be in form of the rescission of a contract of sale. In spite of that, the purchaser will not be getting more than the price of the object for which he has paid. He will not be compensated on the loss he might have suffered or a profit that he might be gaining. The theory of damage and compensation arising therefrom in Islamic law has not been extended to cover such compensation. This situation is explained as:

"If a man bought a garden and worked in it until he yield grapes and [other] fruit [and the land is subject to *damān al-istiḥqāq*] he is not allowed to take anything from the garden and he is not entitled to any wage for the work he has performed. This because, all benefits are nothing but at outcome of a contract and he is not a worker but a person who is working for himself [and thus unable to draw the benefits....]²³

Damān al-istiḥqāq is also known as *damān al-darak* which means that a contract must intrinsically necessitate that the object of the contract is free from any defect and free from the right of others. Whenever the ownership of others to the property can be established, the contract of sale will be suspended (*mawqūf*) and subjected to the consent of the rightful owner. If he consented to the transaction the object of the sale will remain with the purchaser and the rightful owner can take the payment from the vendor. Otherwise, the sale is rescinded and the vendor is required to return the payment to the purchaser.²⁴

"According to the Islamic contractual principles, parties to a contract are equally liable to each other. Firstly, they have to guarantee

²³. *Majmaʿ*, p.233.

²⁴. This kind of guarantee is approved by the majority of jurists on ground of necessity. There is a pressing need to have such warranty. If this regulation did not operate, it will inhibit trading with a stranger, as it is detrimental to the basic philosophy of the law on sale. See Muḥammad Muṣṭafā Shalabī, *Taʿlīl al-Aḥkām*, p.379.

that they have full ownership of the object and payment [and not subjected to right of others] and this is known as *ḍamān al-istiḥqāq*. Secondly, they are also liable if the subject-matter is defective within the term of the contract of salethis is called liability for defect (*ḍamān al-ʿayb*). Failure to provide both liabilities will cause the transaction to become a voidable contract. It is up to the defrauded party either to terminate the contract or to proceed with it.”²⁵

The protection of ownership in Islamic law is clearly manifested in the rules on protection of *bona fide* acquisition. If an object is claimed by a third party (*istiḥqāq*; *istirdād*), the party who has sold it becomes liable for the *darak*, the default in ownership, to the amount of the price paid.²⁶ In such a situation, the seller is accordingly bound to return to the buyer either the property itself, its price, its equivalent (if it is fungible), or its value with the value of such improvements as were made by the buyer himself. Jeanette Wakin in her edition of al-Ṭaḥawī's *Kitāb Shurūṭ al-Kabīr*²⁷ has said :

“Although the *darak* guarantee is normally given in favour of the buyer and is written into the document only when real property is transferred, these application are extended in Ṭaḥawī's contracts. First the function of the clause to protect against incomplete ownership is brought out in several contracts where the buyer becomes responsible for the *darak* if he has had the property in his possession and it is, or might be, returned. Since the claim of a third party does not enter in unless the buyer himself turns the property [over] to another, formulas singling out the buyer as the only source of a fault in ownership [are] added.”

Al-Ṭaḥawī further points out that *shurūṭ* scholars do not ordinarily write a *darak* formula into the contract except in the sale of immovable property (*ʿaqārāt*) and his sense of precaution can be ascertained by his saying “there is no harm if you write it in”. Certainly the seller of movables was obliged to undertake the

25. *Naz. Ḍamān*, p.237.

26. *Qawānīn*, pp.286-287; *Introduction*, p.139.

27. See Wakin, *op.cit.*, p.61.

same guarantee, but movables are generally of less value than real property, and this is probably the reason *darak* clauses could be omitted in such contracts. Only if the transaction involves a considerable value, is the *darak* formula carefully included in the contract. In the case of property to be delivered at a later date, *darak* does not appear in the contract. Instead, a separate document of *shahādah* is drawn up after delivery takes place.²⁸

In the later development of the final settlement clause, al-Ṭaḥāwī also inserted a clause denying rights and claims in contracts. Those acknowledgements purported the relinquishment of future rights and claims. The acknowledgement reads:

“Fulān, the buyer, has no rights in this property [whose boundaries are] defined in this document, nor in any part of it, neither its land or any building constructed on it. He has no right of claim (*daʿwā*) nor can he make any demands (*ṭalibā*) by reason of [alleged] ownership, sale or anything else, for any cause or reason whatsoever. Any legal claim he might put forward concerning this property..., any part of it, its land, buildings, and anything else besides, or any claim that someone else might put forward on his behalf, witnesses who might testify to that [action] in his favour, any document he might produce, any proof he might bring to bear, any judicial oath he might offer fulān [the seller] to swear in court, any claim, dispute, litigation or vindication (*muṭālabah*, *munāzaʿah*), all that [shall be considered] false and invalid, a fiction and arbitrary proceeding (*fa dhālika kulluhū zūr wa bāṭil wa ifk wa zulm*). And fulān [the seller] is declared exempt from all [such actions] and is free to dispose of that over which he has power (*fī hilli wusʿihī*) both in this world and the next, because fulān [the buyer] knows and is cognizant of the fact that he has no right of claim over that property, nor any part of it, nor has anyone else the right of claim due to his initiative, without its being an offence against the law and wrongful action.”²⁹

28. Ibid., pp.62-63. This standpoint is also shared by Ibn Abi al-Damm as he remarked : *ḍamān al-darak* pertaining to the property sold by the vendor, in favour of the purchaser, is obligatory [as an implied term] by virtue of the sale, even if there is no expressed terms on it. Despite that, the notaries write it down so as to magnify the importance of the guarantee. This is also to make things clearer and avoid any unclear outlook. See *Adab al-Qaḍāʾ*, pp.376-377.

29. Wakin, ibid., p.64.

3.5 Restitution for Defects

‘*Ayb* is a latent defect which exist in the goods at the time of the contract, which is material to the purpose of the contract and substantially impairs the value of the goods to the recipient.³⁰ These criteria are determined by normal commercial usage (‘*urf*).³¹ The classical writings have defined ‘*ayb* in detail, possibly because the understanding of it is so important in order to allow the smooth operation of settlement of civil disputes related thereto, be it judicial or extra-judicial.

In *Fatḥ al-Qadīr*³², ‘*ayb* was defined as anything that will call for reduction in value (*nuqṣān al-thaman*) as recognised by customary standards of the merchants (*fi ‘ādat al-tujjār*). The noted Ḥanafī text, *Badā’i‘ al-Ṣanā’i‘* by al-Kāsānī accepted a similar definition, except it indicated that such a decreasing value had an absolute effect, whether it was gross (*fāhish*) or insignificant (*yasīr*). On the same premise, the Majallah has embodied this concept in its code by regulating that ‘*ayb* is any reason that will cause reduction of price as determined by the traders and professional in the field (*al-tujjār wa arbāb al-khibrah*).³³ Hence, it is evident that, ‘*ayb* is what will hinder the original purpose of the buyer (*gharaḍ ṣaḥīḥ li ‘l-mushtarī*) provided that the similar goods available in the market are predominantly without such deficiencies. It is even spelled out in *Fatāwā al-Bazzāriyyah* that if a person bought a *khuff* (leather boot), a *qalansuwah* (headgear) or a *thawb* (shirt) and he found that it is too small for him, it is ‘*ayb*.³⁴

³⁰ *Maj. ‘Adliyyah*, arts.336-339.

³¹ *Commercial*, p.65.

³² Ibn Humam, *Fatḥ al-Qadīr*, vol.V, p.274.

³³ *Maj. ‘Adliyyah*, Art. 338.

³⁴ *Sh.Bāz*, p.182.

"The [rationale] for the decision is that since the merchandise does not serve the purpose of his purchase, that reason is accepted to rule the object of that transaction as "defective". This will necessitate the return of the merchandise.....it was however argued that this indicator of the defect (*dābiṭ al-ʿayb*) seemed not to be ultimate (*ghayr jāmiʿ wa māniʿ*). Firstly, in the case of *khuff*, *qalansuwah* or *thawb*, if they are not suitable for the buyer, they likely be suitable to other people without the price falling. In the case of a transporting animal (*dābbah*), its clumsiness or old age will reduce the price, even though it is not strictly *ʿayb*. Therefore, it is incumbent to have a clearcut criteria of *ʿayb* as required by the Shāfiʿī school. In *Fatāwā Qāḍikhān*, it is said that if the merchants are having difference of opinion, the law on *ʿayb* will not operate."³⁵

Muṣṭafā Zarqā's definition seem to fill this gap as he said that *ʿayb* as perceived in Islamic law in the context of *ḍamān al-ʿayb* is what will diminish the [natural liking and satisfaction] of the merchandise and reduce the price accordingly. It can be strengthened with al-Marghīnānī's definition as translated by Hamilton as: "A failure of a contract to achieve the purpose for which the contract is made". To allow the recipient to rescind the contract upon discovery of such a fault means that there is a condition of marketability of the goods implied in every contract of sale. It is the duty of every vendor to provide full disclosure in this regard, which is the case in English law only in the restricted field of contracts *uberrimae fidei*.

"It has been an accepted principle in Islamic contract law that the parties to the contract are bound by law to disclose all defects, within their knowledge concerning the object, even if such disclosure may stop the other party from entering the contract or will cause the fall of price, for freedom from defect is one of the requisites in all kinds of contracts."³⁶

35. *Sh. Bāz*, p.182.

36. Mohd.ʿAlī Baharum, *Misrepresentation : A Study of English and Islāmic Contract Law*, al-Raḥmāniah, Kuala Lumpur, p.119.

The Prophet himself is reported to have written to one Addā b. Khālīd which reads : This is a written affirmation by which Muḥammad the messenger of God, has made a purchase from Addā b. Khālīd, the barter of a Muslim with a Muslim. There is no defect in it nor any deception nor any evil.³⁷

Practically, the duty to disclose defects exists during the pre-contractual negotiations. The duty to disclose is a tortious duty not a duty arising from the contract. Concealment of defect, if any, or restraint or unwillingness to clarify it, is regarded as fraud, which will form a separate ground for *ḍamān*.³⁸ Failure to disclose will make the contract voidable and the defrauded party may either rescind or affirm the contract for the full price. The right of option is given on the premise of option for defect (*khiyār al-ʿayb*) rather than option for fraud (*khiyār al-taḍlīs*) even though both are quite similar in their purpose to restore the defrauded party to the position he was in before the contract was concluded.³⁹

However, having knowledge of a defect and failing to disclose is not treated as a prerequisite for granting rescission, for the right of rescinding or affirming the contract is still available even if the vendor did not realise the defect at the time the contract was concluded. On this basis it is established that rescission can be made solely on the basis of the defect and the duty to disclose seem to be a moral rather than a legal obligation.⁴⁰ The Malīkī school apparently requires that only serious defect will be entertained, whereas other schools ruled that defect is an absolute ground to obtain the available remedy.⁴¹

37. Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, vol.IV, p.20-21.

38. *Mājabāt*, p.60.

39. Mohd. ʿAlī Baharum, op.cit., pp.119-120.

40. *Mughnī*, vol.IV.,p.238.

41. The Malīkī's standpoint can be ascertained from one of its reputed text by Ibn Juzāy al-Gharnāṭī. See *Qawānīn*, p.267.

‘Abd al-Razzāq al-Sanhūrī has outlined that ‘*ayb* in a corporeal property can only be established upon four conditions namely, the ‘*ayb* must be material to the price or value of the good, it must be prior (*qadīm*)⁴², it must not be known to the purchaser and the vendor should not have stipulated exemption from the defect (*al-barā’ah min ‘l-‘ayb*).⁴³

As the issue of the standing of ‘*ayb* in affecting the level of price has been dealt with earlier, next there will be a discussion on the requirement that ‘*ayb* must be perpetually pre-existing. *Fiqh* texts speak about the fact that ‘*ayb* must exist during the conclusion of the contract of sale or afterward but before delivery. If ‘*ayb* took place after delivery, the right of option in this case will not arise at all because such a right is based on the fact that a defect has occurred in the object of sale prior to the conclusion of the contract or delivery of the object.

3.6 Restitution for Misrepresentation

The commonest term used to describe misrepresentation is *taghrīr*, which is synonymous with *ghurūr*. Malikī jurists as well as some scholars from other schools use the term *tadlīs* instead of *taghrīr*. It is observed that traditional jurists have used *ghurūr* whereas the term *taghrīr* seem to represent the trend of contemporary Islamic jurists.⁴⁴

⁴²*Maj. ‘Adliyyah*, art.339.

⁴³See *Maṣādir*, vol.IV, pp.245-257.

⁴⁴. Mohd. ‘Alī Baharum, op.cit., p.10.

No exhaustive definition of misrepresentation which covers all types of misleading statements or conducts can be found in the text of Islamic law, both classical and modern. Misrepresentation is predominantly defined according to its specific types of transaction. Badrān Abū 'l-Aynayn defined misrepresentation as a statement by which another party is induced to enter into a contract with the expectation that he could secure maximum profit out of it, but unfortunately it was otherwise.⁴⁵ The Majallah defined it as “representing the attributes of a contract’s object to a purchaser with an unreal attribute”.⁴⁶

This definition clearly does not convey the exact scope of misrepresentation as perceived by Islamic law. This is due to the fact that it is only confined to misrepresentation by statement and covers neither active fraud nor concealment of defect. In term of its treatment, it is seemingly exclusively confined to contract of sale and assumes that the misrepresenter will always be the vendor. However, misrepresentation does not only occur in contracts of sale but in other kinds of contract and the misrepresenter can either be the purchaser or the vendor. In this respect, it may be suggested that misrepresentation can be better defined as : a false assertion of fact, either by act or word, or the prevention from disclosure of an existing defect in the object by which another party is induced to enter into a contract.⁴⁷

Misrepresentation is classified in Islām under three headings, namely active fraud, false statement and concealment of defects. The rules on active fraud are

⁴⁵. Badrān Abū 'l-Aynayn, *al-Sharī'ah al-Islāmiyyah*, p.457.

⁴⁶. Art.164.

⁴⁷. Mohd. 'Alī Baharum, *op.cit.*, p.11.

derived from the leading case of *taṣriyyah*⁴⁸ which is then extended by *qiyās* (analogy) to other fraudulent acts such as *habs mā' al-qanāt*, an active fraud in land transactions. It means that there is a genuine absence of water in a plot of a land, it is watered with the intention of making the other party believe that the land is fertile and productive and thus valued at a high rate, when this is not the case.⁴⁹ It has also been extended to the case of fraud of beautification (*al-shamtā'*) whereby a vendor may create positive or attractive peculiarities in an article with an intention of deceiving the other into expecting that the article is new or in good condition.⁵⁰

False statement in Islamic law covers the contract of *mustarsil*, *najash*, *ghubn* and *talāqī al-rukbān*. *Mustarsil* is the contract of an easy-going customer who does not bargain and who is ignorant of the market price. It is an *uberrimae fidei* contract whereby the purchaser believes what he is informed by the vendor about the real value of the particular article. It becomes an *uberrimae fidei* contract because the parties to the contract have a fiduciary relationship, in which the vendor is entrusted with the purchaser's confidence that he will tell the truth or reveal those facts which he possesses.⁵¹

⁴⁸. *Taṣriyyah* is also known as *muṣarrāt*. It is an act of refraining from milking an animal for several days before a sale, with the intention of making the teats bigger [indicating high yield of milk] and eventually thereby inducing the other party to contract. Another example always quoted in classical works on misrepresentation is *al-najāsh*, wherein an accomplice of the vendor raises the price of an article in an auction by "bidding up", even though he has no intention of buying it.

⁴⁹. Al-Bajirmī, *Hāshiah al-Bājirmī*, vol.III, p.222.

⁵⁰. Classical examples of this type of misrepresentations are [1] mixing a commodity of poor quality with one of good quality ; [2] dyeing an old shirt to make it look new; [3] dyeing the hair of a girl slave or using cosmetic for her rough face. These examples are archaic and no longer applicable but instructive as to the Islamic principle on active fraud.

⁵¹ Ibn Rushd, *al-Muqaddimāt al-Mumahhidāt* vol.III, p.338 cited in M.A.Baharom, *Misrepresentation: A Study of Islamic and English Contract Law*, p.126.

The issue of *ghubn*, whether a gross (*fāḥish*) or an insignificant one (*yasīr*) is closely related to *talāqī al-rukbān*. The similarity rest in the pricing factor as in both cases, the way and extent of profit making through misrepresentation is dealt with. In all Islamic classical text, *laesio enormis* is broadly discussed in the context of the contract of sale as well in other types of transactions. It has been defined as charging a price for an article which is excessively greater than the valuation of a surveyor, based on market price and real value.

"...the demarcation mark between *laesio enormis* (*ghubn fāḥish*) and *simple laesio* (*ghubn yasīr*) is based on the valuation of the surveyor. It is *simple laesio* if the price is below their valuation rate and *laesio enormis* if it goes beyond that."⁵²

Talāqī al-rukbān is trading between businessman from the town and those coming from outlying districts, which is common throughout the history of human civilization till our present time. Such trading may take place in the town when goods are brought by the outside traders to the open market in which all transactions run in accordance with the normal price. Alternatively, it may take place somewhere outside the town when the urban traders intercept those from outside areas, and buy the bulk of their goods at a much lower price than the ordinary market value in town. This is due to the outside traders' ignorance of the market value in the town.

"On the authority of Abū Hurayrah, the Messenger of God said: Do not go out to meet the caravans for trade, do not bid against each other, outbidding in order to raise the price; and a townsman must not buy on behalf of a man in the desert....."⁵³

There are different interpretations among the jurists as to the reason why Islām prohibits meeting outside traders in that manner. According to al-Kāsānī, at

⁵². *Badā'i*, vol.VI, p.30. Cf. Willy Mansbach, "Laesio Enormis in Muhammadan Law," *BSOAS* vol.X [1940-1942], pp.877-884.

⁵³. Al-Nisābūrī, *Ṣaḥīḥ al-Muslim*, vol.III, p.1155.

least two reasons can be suggested. First, the prohibition will protect the consumers from being subject to a monopoly by a certain group of traders who have intercepted the goods from outside traders, bought them at lower price and resold them at market price or even been able to create price instability. This will cause hardships and difficulties to the public.⁵⁴

3.7 Restitution for Failure of Delivery

The delivery of the object of sale is an important duty of the vendor upon valid conclusion of the contract of sale. On the same basis, the purchaser is duty bound to surrender the price. This mutual exchange is incumbent upon both parties, as it is the essence of the contract.⁵⁵

The jurists have highlighted some matters in this respect. Among them are the question of who should deliver first, the vendor's right to hold the property (*habs*)⁵⁶ and the manner the delivery is accomplished. The relevant issue to the present discussion is the right of the vendor who is in possession of the goods to retain possession of them until payment or the tender of price.

“The consequence of the purchaser's obligation to pay the price is that, in return, the vendor enjoys the right to retain possession of the goods until the buyer finishes the payment, whether the whole or half of it.”⁵⁷

⁵⁴ Proper treatment on consumer protection regulations in Islām, based on the idea of *damān*, will be dealt with in a later chapter. It will outline the Islamic standpoint on the subject with special emphasis on the governmental official institutions for the purpose inherent in the institution known in Islamic civilization as *Hisbah*. See Chapter V, *supra*.

⁵⁵ *Fiqh Islāmī*, vol.IV, p.413.

⁵⁶ This concept is quite similar to that of lien in English law as later adopted by Malaysian law. See section 46 and 47 of the Malaysian Sale of Goods Act (1957).

⁵⁷ *Mabsūṭ*, vol.XII, p.192.

The right of the vendor for *lien* is subject to satisfaction of certain conditions. Firstly, it must be an exchange between corporeal property (*‘ayn*) and a financial liability (*dayn*). If it is an exchange between two *‘ayn* or two *dayn*, the right of lien cannot be established. Secondly, the payment of the price must become due immediately. The right of *lien* will not apply in the case of deferred payment. The agreement by both contracting parties for deferred payment stands as a waiver to the right of *lien*.

The jurists has come up with different interpretations on this issue, namely whether or not the vendor has an exclusive right of lien (*ḥabs*). Mālik said: “The vendor is authorized to detain the object of sale (*mabīʿ*) until he secures the price.”⁵⁸ The Ḥanbalī ruled that the vendor is not allowed to retain the property. Delivery (*taslīm*) is an integral part (*muqtaḍayāt al-‘aqd*) of a contract. If there is a dispute between the vendor and the purchaser as regard to *taslīm*, wherein the vendor demanded that he would not deliver the *mabīʿ* until he received the payment, and the purchaser also ruled that he would not give the payment until he received the price of the object of sale, the vendor can be compelled to deliver the subject-matter. Thereupon, the buyer can be compelled to pay the price.⁵⁹

If the purchaser placed the price (*thaman*) as a pledge (*rahn*) or a security (*kafālah*), it will not terminate the right of *ḥabs*. Both *rahn* and *kafālah* will neither discharge the price from the buyer’s *dhimmah* nor the right to be claimed (*ḥaqq al-muṭālabah*). Right of *lien* will remain as a mean of securing payment.

⁵⁸*Qawānīn*, p.247.

⁵⁹*Mughnī*, vol.IV, p.198.

On the other hand, the application of *hawālah* on the price of sale will render the right of *ḥabs* being forfeited, according to Abū Yūsuf, no matter how the assignment of the liability takes place. The right of *ḥabs* is connected with the persistence of the liability on the *dhimma* of the purchaser (*mushtarī*). His *dhimma* is relieved from a debt he owed to the assignor (*muḥīl*) by *hawālah* and his right for *ḥabs* is thus eliminated. Muḥammad al-Shaybānī, on the contrary viewed that *hawālah* from the purchaser will not invalidate the right of *ḥabs*. The vendor can still hold the article sold until he secures the payment from the assignee (*muḥāl alayh*). This is depending on the nature of the *hawālah* itself, whether it is executed by the vendor by an undefined assignment of obligation (*hawālah muṭlaqah*) or by a defined one (*hawālah muqayyadah*), as the right of *ḥabs* will remain intact in the former but not in the latter case.

In the fiqh literature of various schools of law, the question of delivery is explained in great detail, in order to supply a comprehensive understanding of the subject. Delivery of immovable property (*‘aqar*) is effected by the vendor giving up possession (*takhliyah*), whereas delivery of movable chattels (*manqūl*) is effected in accordance with local custom.

"In a perfect sale, the ownership of the object and the risks pass to purchaser, by mere consent of the parties, except where the vendor withholds the object on account of non-payment, or where it has been seized as a result of a judicial decree. In these two cases the vendor's responsibility is on a par with that of a pledgee. The vendor is equally responsible in the sale of unascertained goods (that is goods which have not been viewed) until delivery.⁶⁰

⁶⁰*Mukhtaṣar*, p. 166.

A situation akin to that of the right of the unpaid vendor arises in the *Majalah*, with regards to the purchaser's insolvency.

"If the purchaser dies bankrupt after having taken delivery of the object sold, but without having paid the price, the vendor cannot demand the return of thing sold but becomes one of the creditors".⁶¹

Thus, the thing sold is disposed by the court and if the sum realized is sufficient, the amount due to the vendor is paid in full, any surplus being paid to the other creditors. If less than the sum due to the vendor is realized, the full amount thereof is paid to the vendor, and the balance still remaining due is deducted from the estate of the purchaser.⁶² However, if the purchaser dies bankrupt before delivery of the object sold and payment of the price, the vendor has a right of retaining the object sold until payment has been made from the estate of the purchaser.

PART TWO : DAMĀN IN FIDUCIARY RELATIONSHIP

ʿAqd amānah is a type of legal relationship wherein the property concerned is the property is hold in the hand of the possessor (*yadd al-qābiḍ*) as a trust (*amānah*).⁶³ His position as a trustee has excluded him from liability except if his transgression (*taʿaddī*) and negligence (*tafrīt*) whilst the property is in his hand is

⁶¹ *Maj.ʿAdliyyah*, Art. 295.

⁶² *Maj.ʿAdliyyah*, Art. 296.

⁶³ Art.762 of *Maj.ʿAdliyyah* reads: "*Amānah* is the thing which is existing with the trustee, whether it is a trust based on a contract of safekeeping (*istihfāz*) like *wadīʿah* or a trust falling under a contract like the contract of hire and lending or it becomes a trust in the possession of a person without any contract nor intention..." For details see *Sh.Atāsī*, vol.III, pp.220-222.

established.⁶⁴ This is different from *‘aqd ḍamān*, as discussed earlier, as in that case the property in possession is a liability of the holder.

This ruling is directly extracted from the sunnah of the Prophet: “There will be no *ḍamān* on the depositor (*mustawda‘*) and borrower (*musta‘ir*) who does not betray the deal”.⁶⁵ In another ḥadīth, it was reported that the Prophet ruled: “He, to whom a thing is entrusted, should return it”. More numerous are ḥadīth which relate to compensation when the property deposited has been lost or has perished, wherein there will be no liability.⁶⁶ This is due to the fact that the depository is regarded as a person worthy of confidence. There are also ḥadīths dealing with the situation of forfeit, because the depository has not observed the necessary care or has acted illegally.⁶⁷

“This concept of trustee pervades the whole of Islamic jurisprudence, particularly with a view to limitation of liability...”⁶⁸

Muḥammad Fawzī Fayḍ Allāh notes that *‘uqūd amānah* that fall under this category includes contract of safe-keeping or deposit (*wadī‘ah*), loan of fungibles (*i‘ārah*), partnership (*sharikah*), agency (*wakālah*), bequest (*waṣāyah*) and gift (*hibah*). Clearly, this present study will exclude the last two contracts namely, bequest and gift as they are not strictly commercial dealings.

⁶⁴ *Maj. ‘Adliyyah*, art.768 reads: [*al-amānah lā takun maḍmūnah ya‘nī idhā halakat aw ḍā‘at bi lā ṣun‘ al-amīn wa lā taqṣīr minh lā yalzīmuḥu al-ḍamān*].

⁶⁵ This ḥadīth is reported by al-Dārquṭnī and al-Bayḥaqī in their respective sunans. See al-Zayla‘ī, *Naṣb al-Rāyah*, vol.IV, p.115. The term used in the ḥadīth is “*al-mughill*” which means “*al-khā‘in*” (faithless, unreliable and traitorous).

⁶⁶ See Ibn Mājah, *Sunan* [Kitāb Ṣadaqāt], bāb 7 ; *Kanz al-‘Ummāl*, vol.VIII, no.5443, 5444, 5448, 5449, 5450].

⁶⁷ Otto Spies, “Wadī‘a”, *El(I)*, vol.IV, pp.1079-1081.

⁶⁸ *Maritime* , p.58.

3.8 Contract of Deposit

Deposit (*wadī'ah*) is a contract whereby a property is remitted to a trustee to be kept, often gratuitously by the latter, and later returned to its owner on demand. The property so remitted is held in trust (*qabḍ amānah*). A trustee is liable for the loss or misappropriation in that property, only if he committed an act of transgression (*ta'addī*)⁶⁹ such as using the property for his own use or negligence (*tafrīt*) such as storing the property in an unsafe place from where it was stolen.⁷⁰

Despite the fact that the act of transgression is more serious than that of negligence, Islamic law does not make a distinction when it comes to the remedy it advocates. In either case, a disgraced trustee becomes liable (*dāmin*), for the same damage normally owed by a usurper (*ghāṣib*). Nevertheless, it is only fair to note that al-Kāsānī has perceived that a trustee's liability does not always rest on one and the same ground.

“A trustee is transformed into a guarantor if he neglects custody, but if he makes personal use of the property entrusted to him, he perverts the essence and objectives of the contract of deposit and becomes liable for damages on that account.”⁷¹

⁶⁹*Ta'addī* in a *wadī'ah* is committing something which the depositor dislikes other than lack of taking care of the property like the depositee utilising the property for his own benefit. There are some scholars who have included lacking of taking care of the property to be the primary meaning of *ta'addī* like a caretaker at the public bath (*ḥammāmī*) who had slept or disappeared when he is suppose to be working and the users' clothes were stolen. See *Sh. Atāsī*, vol.III, p.244. The Mālikīs ruled that the ground for *ḍamān* in *wadī'ah* is *taqṣīr*, are listed under six grounds namely: 1. Redepositing it to another person; 2. Moving the property from one country to another; 3. Mixing the property until it is not distinguishable; 4. Deriving benefit; 5. Lost or destroyed and 6. Breach of the agreed methods of the safekeeping. See *Qawānīn*, p.321.

⁷⁰*Maj. 'Adliyyah*, art.777.

⁷¹*Badā'ī*, vol.VI, pp.211-212.

A depositree is duty bound to take care of the property in his custody until it is returned to the owner.⁷² It is a kind of obligation to provide meticulous care (*iltizām bi badhl al-‘ināyah*) rather than to achieve a certain task (*iltizām bi taḥqīq al-ghāyah*). In doing so, he is expected, during his *wadī‘ah* undertaking, to offer the depositor a standard level of care affordable by a reasonable person (*‘ināyat al-rajul al-mu‘tād*).⁷³ Deviation from this standard will render him as infringing the trust and thus liable for *ḍamān*. His accomplishment of the said duty will uphold his position as an *amīn* and exempt him from liability if any *halāk* take place.⁷⁴

Cases on deviation from a standard duty and care which give rise to *ḍamān* have been illustrated clearly by al-Baghdādī. Among others, in the case of redepositing the property to another party :

"It is not permissible for the depositree to give the *wadī‘ah* property to another party without the owner's permission. The claim about permission (*da‘wā ‘l-idhn*) is admissible only with an evidence (*bayyinah*)⁷⁵. To place a *wadī‘ah* property in a safe place (*ḥirz*) of another party is [considered as] fresh *idā‘* except when the depositree rents the safe and he is still taking charge of the *wadī‘ah* himself....should he deposit the property to another party without permission and it is damages, the owner should claim *ḍamān* from the first depositree, not from the second, according to Abū Ḥanīfah. According the two *imāms* [Abū Yūsuf and al-Shaybānī] the owner is at liberty to impose *ḍamān* on either party. If the first depositree pays compensation, he should not claim from the other party and vice versa. According to al-Hidāyah, a depositree should not give the *wadī‘ah* property for hire (*ijārah*) or to place it as a pledge (*rahn*). A deposited property should not be redeposited, given on loan, leased or pledged. If any one of those is performed, the depositree is liable."⁷⁶

⁷²Maj. ‘Adliyyah, arts.781-782.

⁷³The Majallah used the term the standard earnest (*ḥirz al-mithl*) for this concept. See Maj. ‘Adliyyah, art.782.

⁷⁴Maṣādir, vol.VI, pp.156-157.

⁷⁵Although it was mentioned in general, it is presumed that what is required here is a written evidence or an oral evidence supported by a witness.

⁷⁶Majma‘, p.69. See also Maj. ‘Adliyyah, arts.784.

Apart from *ta'addī*, *tafrīt* is another ground for *ḍamān* in *wadī'ah* contracts. *Tafrīt* is the situation when the deposittee does less than he ought by omitting the necessary care. This take place when he does not prevent damage to the deposited property, for instance he neglects the usual way of preserving it and does not observe the instruction of the depositor.

Al-Baghdādī also pointed out that, one of the common deviations in *wadī'ah* that give rise to *ḍamān* is breach of the agreed terms of the *wadī'ah* contract. He explains :

"Whenever the depositor stipulates a condition which is beneficial (*shartan muḥḍan*), the deposittee is bound by it. If the depositor ruled that "keep it in this house" and the deposittee instead kept it in another house, he is liable, as there is an inevitable disparity (*tafāwut*) between the two houses in terms of their safety and the condition is upheld. It is also opined [by someone] that the deposittee is not liable if the other house is better it terms of its safety or at least has not been on a par with the first house. There is also an opinion saying that if there is no need to move it to another house, the deposittee is liable and contrariwise, he is not liable if moving it is needed but mentioning it at that moment will be meaningless as he is not required to execute his duty by any means he cannot undertake. Similarly, if it stipulated "do not take the *wadī'ah* with you [on a trip] to another place" but the deposittee break that condition, he is liable. The condition is valid as the cost of care in Egypt could be costly. If the condition [attached to the contract] is not beneficial, it can be ignored. For instance, if it is required that [it must be kept] in certain box in certain a house..."⁷⁷

As has been pointed out earlier, the act of transgression will convert the status of the deposittee from *amānah* to *ḍamānah*. Al-Baghdādī has briefly commented on this matter by making a note: "If the deposittee trespasses the nature of a *wadī'ah* contract, he shall be liable." Among other examples quoted to illustrate

⁷⁷*Majma'*, p.70.

the transgression are a *dābbah* (transporting animal) that has been used by him, a garment he has worn or a slave from whom services have been received.⁷⁸ All cases mentioned can be classified as utilizing the *wadī'ah* for personal satisfaction without any consent from the owner, and taking advantage in that manner is treated as an infringement of the right of the depositor.

Another possible situation in *wadī'ah* is the mixing of the *wadī'ah* property with the depositee's own similar property, to the extent that is impossible to distinguish the two properties. The classical works, usually refer to mixing of silver coins (*darāhim*) or more importantly, mixing of grains like wheat, barley and others, as well as mixing of vinegar with oil or oil with oil. In this case, there are two separate rulings. Firstly, if the two properties are of the same genus, it can become a shared property, if both parties agree. Secondly, in the case of the property of two different genus and the mixing has spoiled both properties, the depositee is liable.⁷⁹

There also instances where the depositee, for some reasons, failed to return the property as requested by the depositor. The test that is applied by the law in deciding such a case, is whether or not he is legally capable of meeting the request. Should there be no impediments justified by law, he is liable.⁸⁰ It is further ruled that:

"If the depositee refuses to return the article without reason, the degree of liability increases, if the thing deposited deteriorates. While the depositee is generally not responsible for any casual deterioration, he is now liable for casual deterioration, since he is delaying restitution."⁸¹

⁷⁸*Majma'*, p.73.

⁷⁹*Majma'*, p.82.

⁸⁰*Majma'*, p.84. Cf. al-Wansharisī, *al-Mi'yār al-Mu'rib*, vol.IX, pp.87-88.

⁸¹. Otto Spies, op.cit., p.1080.

The contract of *wadī'ah* is terminated by the return of the thing deposited. Both parties have the right to dissolve the contract when they please. The restoration can therefore be made at any time and at the wish of any party since the contract is *'aqd jā'iz*. If one of the two contracting parties dies or becomes insane, the agreement is automatically terminated. The property will remain in its original position until the *wadī'ah* transaction is ended by the return of the *amānah* to the rightful party. As a conclusion, it is clear that, apart from its purpose of limitation of liability to trustees, *wadī'ah* manifested a distinction to that of *amānah* that implies obligation of good faith, without a binding agreement.

3.9 Contract of Agency

In the course of doing business, a merchant may have to seek help from another party to perform certain tasks. An important aspect of this *wakālah* or giving a mandate to an appointed agent (*wakīl*). Ibn 'Arfaḥ said that agency arises when one party authorizes another to replace him in the exercise of civil dealings. In that sense, an agent may be entrusted with all acts which can be done by a representative, such as concluding a contract, collecting a sum due, assigning a debt or discharging a debtor and others.⁸²

In the manuals of Islamic law, *wakālah* (or alternatively *wikālah*) is explained as a legal relationship in which an agent is authorised by the principal to

⁸²*Mukhtaṣar*, p.201. Cf. *Maj. 'Adliyyah*, art.1449 and *Maj. Shar'īyyah*, art.1186.

execute a permissible and determined right of disposition (*taṣarruf jā'iz ma'lūm*).⁸³ Al-Shāfi'ī's elaborates this in the following way: "Agency is [a contract] when a person delegates [the function] he is supposed to execute, to an agent in matters where delegation is allowed (*min mā yaqbal al-niyābah*) due to be performed during his lifetime."⁸⁴

As regards conditions of agency, it is required that the agent must be of sound mind and understanding. Pertaining the commercial practices that can be delegated, it is established that any person may appoint any other person as his agent to perform any act which he can himself perform. For instance, a principal can appoint an agent for buying and selling, giving and taking hire, giving or taking a pledge, giving and taking a deposit, receiving payment of debt and others. What is important is that the subject-matter of the agency must be known.⁸⁵

As in other transactions, the parties will have to observe the usual formalities of *ijāb* and *qabūl* to establish a legal relationship between them. That process will allow the principal to inform the agent he has appointed him as agent for a certain purpose by using any expression indicating that intention. Offer can be treated as valid if it is only in the form of permission and ratification. The extreme case is the *fudūlī*, wherein subsequent ratification of a sale is accepted as having the same effect as a previous authorization to act as agent.⁸⁶

⁸³*Badā'i*, VI, p.19 ; Ibn 'Ābidin, *Radd al-Mukhtār 'alā Durr al-Mukhtār*, IV, p.471 ; al-Zaylā'ī, *Tabyīn al-Ḥaqā'iq*, IV, p.254.

⁸⁴*M. Muḥtāj*, II, p.217.

⁸⁵*Maj. 'Adliyyah*, arts. 1458-1459; *Maj. Shar'īyyah*, art.1200.

⁸⁶*Maj. 'Adliyyah*, arts.1451-1454. See earlier discussion in Chapter I, *infra*.

Whenever a *wakālah* contract is concluded, the agent will hold the status of a trustee (*amīn*) as regards the delegated undertakings. He will not be liable for *damān* except in the case of *ta'addī* and *tafrīt*, similar to that of *wadī'ah*. On that basis, his testimony is admissible.⁸⁷ Another aspect which is worth noting is that the *wakālah* may be unspecific (*tafwīd 'āmm*) or a specific delegation (*tafwīd khāṣṣ*) as that will be an important characteristic for the determination of liability.

"*Tafwīd 'āmm* includes what is susceptible for delegation (*niyābah*) in financial matters (*al-umūr al-māliyyah*), marriage, divorce.....al-Shāfi'ī said *tafwīd 'āmm* is not valid. *Tafwīd khāṣṣ* is meant for what is delegated by the principal to the agent in respect of taking possession [of property] for selling or in litigation."⁸⁸

a] *Wakālah* in sale.

In the case of *wakālah* in *bay'*, if it is concluded without any clear instruction in respect of price or mode of payment, the *wakīl* is not allowed to sell the merchandise except at a standard market price (*thaman al-mithl*) though he cannot be selling by instalment (*mu'ajjalan*). Even if sold, the merchandise in a manner in which no reasonable person could be defrauded but he sold it by deferment, the sale would not be allowed unless it was later endorsed by the principal (*muwakkil*). This is decided so on the basis that the *wakīl*'s action is likely to infringe the *muwakkil*'s interests and thereby his approval needs to be sought.

The principal's unspecific delegation does not amount to allowing the agent total freedom in his actions but rather it expects that the agent will discharge his duties guided by the accepted customary commercial practices and what is benefi-

⁸⁷Sayyid Sābiq, *Fiqh al-Sunnah*, vol.III, p.299.

⁸⁸*Qawānīn*, p.281.

cial and favourable to the principal. The view is the preferred one even though there are dissenting views which hold that the delegation should be treated as totally unspecific and thus can be executed accordingly. Above all, it is suggested that if *wakālah* in *bayʿ* was given as *wakālah muṭlaqah*, it should be accepted as such.⁸⁹

On the contrary, if the terms and conditions of the contract are well-defined (*wakālah muqayyadah*), the *wakīl* is bound by the prescription set by the principal. He is not allowed to go against them unless that would be advantageous to the principal. For instance, if he was instructed to sell at a certain price but sold it at a higher price or he sold it with immediate payment even though he was asked to sell it by instalment - the transaction is valid. The Ḥanbalī's appeared to be offering a very practical remedy by ruling that if the *wakīl* is selling without *thaman al-mithl* or the price set for him, the transaction is valid but he is liable for *ḍamān al-naqṣ* (compensation for reduction).⁹⁰ *Ḍamān al-naqṣ* is said to be the difference between the actual price and the lower sale price by the *wakīl* or the difference between sale in ordinary situation and the situation where *ghubn*(laesio) has taken place.

Al-Shāfiʿī ruled that if the variation goes against the principal, the *wakīl*'s transaction is void. The Ḥanafīs, quite contrarily, has treated such a case as *fuḍūlī*, wherein the status of the transaction is suspended (*tawaqquf*) subject to the ratification of the principal. If he ratifies, the sale is valid. Otherwise the transaction is invalid.

⁸⁹Ibn Qudāmah al-Maqdisī, *al-Sharḥ al-Kabīr*, vol.V, p.86.

⁹⁰Ibid. ,vol.V, p.78.

The *wakālah* is not unlimited. The *wakīl* is authorised only to exercise what has been demanded by the principal or at least within the immediate legal consequences of a contract, though nothing specific is mentioned. Ibn Qudāmah al-Maqdisī suggested that if a principal authorises the sale of an article, that will include *taslīm* (delivery) as the authorization for sale will include delivery as part of the legal effect of the said contract. However, he is not allowed to authorise *ibrā'* (release from liability) or anything similar, unless there is an express permission for it.

b] Wakālah in Purchase

In *wakālah fī 'l-shirā'*, the principal is required to state the nature of the merchandise to be purchased and the price of it. As in the case of *bay'*, the agent is bound by the conditions attached to the contract. If the agent acts in contravention of the principal's instruction as to the nature of the merchandise purchased, the principal is not bound thereby, however more advantageous the thing may be. The agent is considered to have bought the property for himself and not for the principal.⁹¹

A precedent from the Prophet can be cited to demonstrate the opposite situation wherein any contravention that brings about advantages to the principal is permitted. It was reported from 'Urwah al-Bārqī that the Prophet had given him one *dinār* to purchase a sheep but 'Urwah managed to buy two sheep with the same

⁹¹*Maj. 'Adliyyah*, art.1471 : if the principal instructs the agent to purchase a ram and he buys a sheep, the principal is not bound thereby, and the sheep belongs to the agent.

amount of money. He then sold one of the sheep to someone for a *dinār* and returned to the Prophet with a sheep and a *dinār*. The Prophet offered a prayer for him so that he would gain the blessing from God for that transaction.

3.10 Position of a broker (dallāl or simsār)

From the historical sources, it is established that commercial agency and distributorship known in modern commercial law terms, in the strict sense of the term, is less practised in the medieval Islamic trade. The traders were more accustomed to sell directly to the public the products that they themselves had manufactured. Distribution by a party acting as commercial agent and distributor as practised in modern society on a large and systematic scale was quite unknown.⁹²

The concept of an intermediary in commerce is well recognised in Islamic law, though the size of the treatment in the legal manuals is very limited. Most of the scholars have quoted a ḥadīth on freedom of stipulation in support of the practice. The ḥadīth reads: "Muslims are bound by their stipulations except when they

⁹²Maxime Rodinson, "Le marchand musulman" in D.S.Richards (ed.), *Islām and Trade in Asia: A Colloquium*, Oxford and Pennsylvania University Press, 1970, pp.22-24. In the 10th century, merchants who freighted ships used to place their goods with an agent called *wakīl fī 'l-markab*, who was instructed to sell the goods and purchase whatever the merchant stipulated. See Ibn Shahriyār, *Kitāb 'Ajā'ib al-Hind*, Leiden, 1883-86, p.144. Later, agents became known as "accompaniment of trade" (*tawābi' al-tijārah*) according to Abraham Udovitch, "Commercial Techniques in Early Medieval Islamic Trade" in *Islām and the Trade in Asia*, op.cit., p.56. In the course of East Indian trade, the concept of agency has been broadened to include an officer called *wakīl al-tujjār* (representatives of the merchants) whose function was similar to that of the later foreign consuls. He was at the same time both the legal adviser and bank exporters. He also set up warehouse facilities (*dār al-wikālah*) for the storage of his client's goods. See J.de Somogyi, "Egypt's Trade and Transport Relations with other Islamic Lands : A Historical Survey" in *Studies in Islām*, vol.XV, July 1978, pp.164-165. For modern legal survey on the subject, particularly in the Arab jurisdictions, see Samir Saleh, *Commercial Agency and Distributorship in the Middle East*, Graham and Trotman, London, 1989, p.4-9.

permit the unlawful and prohibit the lawful.”⁹³ They also quoted Ibn ‘Abbās as saying that there is no objection if a person says, sell this garment, for whatever exceeds your price. Ibn Sirīn opined that if a person said, sell [this good] for such a price and any profit accruing from it is either yours or to be divided between us, this is allowed.⁹⁴

This little respected middle-man has emerged in various small businesses in an isolated way for the purpose of mediating between the buyer and the seller. Although called "broker" in Western terminology by many authors, the role of *dallāl* is much broader than that of the broker in the Western meaning, which is restricted to an intermediary who brings together two persons wishing to enter into a contract without dealing directly with the goods. By contrast, the *dallāl* plays a role similar to that of commission merchant or agent. He holds the goods on behalf of the seller, mediates between seller and buyer, and sells for a fee often taking the form of a commission. The factual description of a *dallāl*'s activities and his rights and duties confirms that the *dallāl* under the *Sharī‘ah* holds the goods on an agency basis, with the main consequence that the principal is entitled to any sum in excess of the stipulated price and the *dallāl* is not entitled to anything more than his brokerage fee.⁹⁵ His position in certain Muslim community is described as :

"In the Muslim West, the *dallāl* is exclusively an intermediary, who in return for remuneration, sells by public auction objects entrusted to him by third parties. In large towns the *dallāls* are grouped in specialized guilds, supervised by a syndic (*amīn*) who compels them to give a guarantee of good faith (*dāmin*). They chiefly concerned themselves with manufactured goods sold by artisans to shop-keepers, industrial raw materials, commodities sold in bulk and others.⁹⁶

⁹³The text of the ḥadīth reads in Arabic : *al-Muslimūn ‘alā shuruṭihim illā aḥalla ḥarāman wa ḥarrama ḥalālan*. Some other reports reads : *al-Muslimūn ‘inda shuruṭihim*.

⁹⁴Sayyid Sābiq, *Fiḥ al-Sunnah*, vol.III, p.141.

⁹⁵Samir Saleh, op.cit., p.10.

⁹⁶G.S.Colin, "Dallāl", *EI(I)*, p.103.

Muḥamad ‘Abd al-Jabbār Beg, in analysing the institution of brokerage said that *dallāl* is not fully accepted in Islamic law and if so accepted will be subject to strict monitoring by the authorities, as it was generally criticised as making profit which is incommensurate with his efforts and amounting to *ẓulm* (injustice). These brokerage activities were considered likely to maintain undue high levels of price for certain commodities which would normally be obtained at lower price in a market where direct transactions were the rule.⁹⁷ Al-Tha‘labī, an eleventh century writer, is followed by a writer of the post-‘Abbāsīd period, criticised the *dallāl* by saying: “Everyone needs capital [in trade] but the capital of a broker is lying.”⁹⁸ The “lying broker” (*kādhīb al-dallāl*) was proverbial in medieval ‘Irāq. Al-Dimashqī, a Syrian writer of the twelfth century, described vividly the deceitful practice of the brokers, who did not hesitate to hoax even their next-door neighbours and dear friends.⁹⁹

Despite a negative assessment of brokers, their role as intermediary in a broad sense that includes commercial agency and distribution undoubtedly becoming more important. The role of the markets supervisors as part of the institution of

⁹⁷M.A.J.Beg, “The Status of Brokers in Middle Eastern Society in Pre-Modern Period” *MW*, vol.67, no.2, April 1977, pp.87-90.

⁹⁸Abū Maṣṣūr al-Tha‘labī, *Thimār al-Qulūb*, Cairo, 1908, pp.193-194 cited in M.A.J Beg, *ibid*.

⁹⁹Al-Dimashqī, *Kitāb al-Ishārah*, p.95. He said: “The brokers sometimes described the excellence of the merchandise and had even tricked the expert with it. Sometimes he mentioned the scarcity of the merchandise and its unavailability in the area and some of them have been sold, other than what he had in hand. He also said that price will rise and demand for it is tremendous.....”

ḥisbah was seen to be an effective way to control the practice.¹⁰⁰ The government would have to intensify the enforcement of the law by price control policy (*tasʿīr*). All these issues will be treated in further detail in the forthcoming chapter on consumer protection in Islām. A better practice of brokers can be supplemented with the formation of guilds of brokers which can stand surety for the smooth and honest operation of its members.

3.11 Contract of Partnership (Sharikah)

Partnership or *shirkah* originally implied simply that a thing belonged to several persons in common in such a way that each one had ownership in every smallest part of it in proportion to the share allotted to him. The jurists therefore understand primarily by *shirkah* common property (*shirkat al-amlāk*) which arises for example through inheritance, gift or indissoluble combination.¹⁰¹ Whatever its original application, the term *shirkah* (or *sharikah*) as understood by the earliest jurists was not primarily common property, but commercial partnership. Discussion of partnership in all schools except the Shāfiʿīs, while covering the topics of joint ownership and common property, are concerned almost entirely with commercial forms of partnership.

¹⁰⁰The broker was antagonistic to *Ḥisbah*. Al-Khaṭīb al-Baghdādī recorded that the broker even abuses the *muḥtasib* by alleging that he has imprisoned such and such man and woman and so on. The *muḥtasib* it appears, rode around the city on horseback to find out the evil-doers and those who caused public nuisance in the city. To some extent, the *muḥtasib* can be described as a municipal official supervising affairs of the markets. The *dallāl*'s criticism on *Ḥisbah* is significant for the officials of the *Ḥisbah* were ever on the watch for the fraudulent practices of the brokers; hence, the *dallāl* abuses the *muḥtasib*. See Al-Khaṭīb al-Baghdādī, *Kitāb al-Tatfīl*, pp.83-84 ; Abū ʿl-Faraj b. ʿAlī b. al-Jawzī, *al-Muntaẓam fī Taʾrīkh al-Mulūk wa ʿl-Umam*, Heyderabad, 1938-39, X, p.223 ; Claude Cahen and M.Talbi, "Ḥisba", *EI(2)*, vo.III, pp.485-488.

¹⁰¹W.Heffening, "Shirka", *EI(1)*, III, pp.380-381.

"The primary connotation of the term *shirkah* or *sharikah* for the Ḥanafī and Mālikī jurists was a contractual partnership involving joint investment and joint sharing of profits and risks. Propriety rights appears almost as a peripheral notion.....the essence of propriety partnership is common ownership of property."¹⁰²

It is clear that the present investigation will subscribe to this notion as the primary concern of it is application of *ḍamān* in commercial dealings. Propriety partnership is excluded for it is a subject for consideration in a general discussion on Islamic *muʿāmalāt* or under Islamic Property law. As far as partnership is concerned, it is likely that the treatment will not be confined to strict *sharikah* only, but also to contracts of *muḍarabah*, *musāqah*, *mughārasah* and the like. The main emphasis will be on the maintenance of justice in partnership as advocated by Ibn Taimiyyah: "Profits is an increment (*namāʾ*) gained from the use of one man's labour and another man's capital (*māl*). It should be divided among them as any increment resulting from two factors." He further said that, if there is any misconduct on the part of the partners by doing something which was permitted neither by law, nor by the capital owner explicitly or in the usage of custom (*ʿurf*), then he will be held responsible for his misdeed.¹⁰³

Commercial partnerships according to Ḥanafīs are divided into two types, firstly the *mufāwadah* that is a universal or unlimited investment partnership and secondly, the *ʿinān* which can be best rendered as a limited investment partnership. The present-day designation "limited" and "unlimited" for a partnership or company denotes the extent of the company's and each of its member's liabilities towards individuals and groups outside the partnership with regard to the obligation

¹⁰²Partnership, p.24.

¹⁰³Fatāwā, vol.30, p.87. Also see Abdul ʿAzīm Islahi, *Economic Concept of Ibn Taimiyyah*, p.158.

incurred in the course of conduct of the company's business. In an unlimited partnership, the company is liable for complete fulfilment of all its obligations, and each partner is liable proportionally to his share in the company's assets and in accordance with the contractual stipulations governing his share of profits and losses. Contrarily, in a limited partnership, as the term implies, there is a limit to the amount for which the partnership and its members can be held liable.¹⁰⁴

In Islamic law, particularly in the Ḥanafī school, the liability of all partners is unlimited. In the partnership, the partners are liable in proportion to their share of the total investment. There is no limit whatsoever on the amount of the partnership's liability. Each partner is responsible for his share of the partnership's indebtedness regardless of what it amounts to, or by how much it exceeds the value of his own share of the company's assets. It is suggested that the nature of liability in various forms of Islamic partnership is distinguishable on the basis of jointness and severalty and not on limitation or non-limitation. In this respect, it appears that liability cannot serve as in modern law, as a basis for classifying partnerships in Islam. It is rather from the perspective of the investment, both its extent and its form, that the different partnership forms are distinguished.¹⁰⁵

Application of *ḍamān* in these partnerships will depend on the nature of the relationship between partners. For instance, in a *mufāwadah* partnership which is essentially based on three features - complete equality of the partners in all respect, the inclusion of all trade activities within its scope, the mutual agency and surety of

¹⁰⁴*Partnership*, p.40-41.

¹⁰⁵*Badā'ī*, VI, pp.56-57;

the partners.¹⁰⁶ Complete equality in all financial matters is an indispensable condition of the unlimited investment partnership. Any deviation from this rule, whether in respect of each partner's contribution to the joint capital, or to the share of profits and losses assigned to him, immediately renders the *mufāwadah* invalid.¹⁰⁷

"Two people contracted a *mufāwadah* partnership and we wrote a contract between them in which we stated : (a) That by this contract they have become partners in all things, both large and small; (b) That this is a *mufāwadah* partnership; (c) That their common capital amounts to such and such and that each has contributed half of it and entitled to half the profit; (d) That each partner can trade in any manner he sees fit. If they negotiate a partnership on this basis, they are indeed a *mufāwadah* partners..... If one of the partners retains for himself the ownership of some capital which is eligible for the partnership, then, because of the breach of equality, the contract will not constitute a *mufāwadah* partnership. However, if the property retained by one of the partners is in the form goods, or a debt owed to him by another person, then the partnership between them is not *mufāwadah*. This is so, because goods and debts are not a suitable form of partnership investment; they are comparable to the personal circumstances of each partner with respect to wife and children, which are exempt from consideration of equality in *mufāwadah* partnership.¹⁰⁸

From a practical point of view, the Majallah suggests that partnership with complete equality is rare.¹⁰⁹ Al-Shāfiʿī's denunciation of *mufāwadah* has been associated with the possibility that one partner might be able to derive an unjustified

¹⁰⁶Al-Sarakhsī's neat definition of *mufāwadah* suggests that it is derived from the idea of delegation of authority (*tafwīḍ*) for each partner empowers his colleague to act freely with the entire partnership. It has also been said that it is from the idea of dispersal (from *fāḍa-yastaftidu*) meaning distributed widely since this contract is based upon the dispersal of authority for all transactions. It is also been associated with *fawḍā* which means equality, and since this contract is based on equality of investment and profit, it is called *mufāwadah*. See *Mabsūṭ*, II, p.152; *Lexicon*, part 6, p.2459 ; R.Dozy, *Supplement aux Dictionnaires Arabes*, 2nd ed., vol.II, p.289.

¹⁰⁷Muḥammad al-Shaybānī, *Kitāb al-Aṣl* [under Kitāb al-Sharikah], fol. 68b, II, pp.15-17 cited in *Partnership*, p.48. The only dissenting view is that of Ibn Abī Laylā who holds that a slight inequality in the investment does not invalidate the *mufāwadah* contract. This is probably due to difference in construction of the term *mufāwadah*. Cf. Abū Yūsuf, *Ikhṭilāf Abī Ḥanīfah wa Ibn Abī Laylā*, Cairo, 1938, p.93.

¹⁰⁸*Mabsūṭ*, vol.XI, p.177.

¹⁰⁹*Maj. Adliyyah*, art. 1331. See *Civil*, p.342.

and undeserved benefit from the extra-partnership income of the other.¹¹⁰ The term “can trade in the manner he sees fit” can be construed as an authorization and thus conferring on the partners the position of *amīn* similar to that of *wadī‘ah* and *wakālah*. On this premise, if anything goes wrong in the trading, the negotiator will not be solely responsible. However, this objection seems to be rather insignificant because at the same time the person concerned holds the status of a *kaftl* as one pillar of *mufāwadah* contract, which carries the *ḍamān* pursuit.¹¹¹ It may be concluded that, as the debate of *mufāwadah* is by itself rather ambiguous, survey on the viability of *ḍamān* will, to some extent, be characterised by this reality.

Nonetheless, *ḍamān* can still play its role in protection of rights, but very much depending on sorting out clear terms and conditions of the contract. This matter has been spelt out by al-Sarakhsī by devising some methods to ensure the smooth progress of the venture. Written agreement is strongly advocated and making clear terms about fidelity (*amānah*)¹¹² and the role of *imān* (expressed as in a God-fearing manner) has been included therein. The suggested formulae is :

"This is a document stating the agreement upon which X the son of Y and A son of B have entered into a partnership. They have entered the partnership in a God-fearing manner and with mutual fidelity. They have become partners in all things, acquisitions and skills, in a universal partnership. They may sell for cash or credit, and they may buy for cash or credit; each of them may operate in these matters according to his judgement. Their capital is such and

¹¹⁰ *Umm*, vol.III, p.206.

¹¹¹ *Maj.‘Adliyyah* art.1334 reads: “A *mufāwadah* partnership also contains a contract of suretyship. Therefore, it is a condition that partners on equal terms should be competent to make a contract of suretyship.”

¹¹² A property attached to a partnership is an *amānah*. When something is entrusted to a person is *amānah*, he is not liable for the loss except in the case of transgression or violation. For instance, if the joint capital was in the care of one of the partners and all or part was lost in transit or as a result of a legitimate but unfortunate business transaction, that partner would not be obliged to restore the loss. If, however, the money was lost in an activity outside the realm of acceptable business conduct such as gambling, then the partner responsible would be liable for the restoration of the entire amount of his colleague’s share of the lost capital.

such, belonging equally to both of them and all of it is in their possession. Whatever benefit God grants them is to be shared equally between them; whatever loss or setback overtakes them is to be borne by them in equal shares. They have entered into a partnership on this basis in the month so and so of the year so and so."¹¹³

Ḥanafī writers keep emphasizing that the conduct of a partnership is presumed on the customary practices of the merchants (*‘adāt al-tujjār*). For this reason :

"Each partner has the right to deposit goods belonging to the partnership; for depositing is one of the customary practices of merchants. It is also one of the necessities of trade and one which is indispensable to the merchant. He has need of this transaction in many situations which are likely to occur. Since a partner has the right to pay a fee to have a deposit taken care of, he has this right when no compensation is involved."¹¹⁴

The notion of *‘adāt al-tujjār* has also been used as an argument to justify some practices in *mufāwadah* contracts. Those cases are like the case of pledge (*rahn*) which is governed by the same rules as those of the deposit, the case of loan whether in form of *‘āriyyah* (loan for use) or *qard* (loan for fungible commodities), practice of purchase, sale and debt and expenses for the execution of *mufāwadah* operations.¹¹⁵

a] Ḍamān in ‘Inān Partnership

Unlike the *mufāwadah*, *‘inān* can take on a variety of forms in respect of the partners' contribution to the common capital and the share of profit and

¹¹³*Mabsūt*, vol.XI, p.156.

¹¹⁴*Badā’i‘*, vol.VI, p.68.

¹¹⁵For details *Partnership*, pp.104-112.

liability allotted to each, as well as to the categories of trade and merchandise which it comprehends. It is not only its structural features which distinguish the *‘inān* from the *mufāwadah* partnership. Each of the *mufāwadah* partners is both *wakīl* and *kafl* for his colleague. In *‘inān* partnership, the relationship of the partners to third parties and among themselves are based exclusively on the principle of agency.

"As for a limited investment partnership (*‘inān*), it is contracted on the basis of mutual agency, but not mutual surety. It is valid in the case of a disparity between each partner's investment, and it is valid when they invest equally, but share the profit unequally. It is further permissible for either of the parties to invest only a part of their property, while the rest remains outside the partnership. The form of capital with which it is permissible to contract a limited investment is the same as that which was indicated permissible in *mufāwadah*.....the price whatever either of the partners buys for the partnership can be claimed from him alone. He may then demand remuneration from the other partner for the latter's share in it. If the entire partnership capital, or the capital of one of the partners is lost before everything is bought, the partnership is nullified. However, if one of them purchases something with his own share of the capital and the other partner's share is lost before anything is purchased with it, the purchased merchandise is common property in accordance with their partnership agreement. The one who laid out the money may demand remuneration from his partner for the latter's share of its cost.¹¹⁶

Pertaining to distribution of profit and loss in *‘inān* contract, Ḥanafī law permits some flexibility but is absolutely rigid in regard to the contractual stipulation affecting distribution of liability. In all partnerships forms, as well as in other forms of commercial association, such as *commenda*, responsibility for losses is to be assigned strictly in accordance with the size of each party's investment. Any deviation from this rule invalidates the contract. This principle is based on numerous legal traditions and is epitomised in one attributed to the fourth Caliph,

¹¹⁶Al-Qudūrī, *Mukhtaṣar*, Istanbul, 1901, p.53 cited in *Partnership*, p.105.

‘Alī b. Abī Ṭālib: “The profit follows the conditions agreed upon, and the loss follows the capital.”¹¹⁷

The principle of mutual agency as which the *‘inān* partnership is based determines the freedom of action of the *‘inān* partnership with respect to the joint capital, his relations with his associate and with the third parties. By virtue of mutual agency upheld in this type of partnership, each of the partners does not become liable for that which is owed by his colleague.¹¹⁸ The liability of the partners towards third parties is several but not joint. Within the partnership recognised in Ḥanafī law, liability for obligations arising from partnership affairs is joint. This principle covers all transactions on behalf of the company in which its members are free to engage. These rights and obligations of *‘inān* partners have been appropriately compared with those of a *commenda* agent (*muḍārib*, *muqāriḍ*).

"Abū Ḥanīfah said : The *‘inān* partner has the right to enter into a *biḍā‘ah* association and to entrust the capital as a *commenda*, even if his partner does not expressly permit him to do so. He is permitted to engage with their partnership capital in all those transactions in which a *commenda* agent may engage. This is also the opinion of Abū Yūsuf and Muḥammad (al-Shaybānī)."¹¹⁹

A *commenda* agent is free to trade with the capital entrusted to him in any manner intended to bring profit to the venture; all accounts, expenses, profits and losses are settled between the agent and the investor. Obligation incurred by the agent towards third parties cannot be claimed directly from the investor. The third party need not even know of the latter's existence. The same is true of *‘inān* partnership.¹²⁰

¹¹⁷Ibid.

¹¹⁸*Mabsūṭ*, vol.XI, p.174.

¹¹⁹Ibid.

¹²⁰*Partnership*, p.135.

b] **Ḍamān in Labour Partnership**

Labour or work partnership, as introduced by the Ḥanafīs, consists primarily of the labour of both partners. The type of labour envisaged is usually a skill in certain kinds of manufacture such as tailoring, carpentry, dyeing, weaving and the like.¹²¹ The classical works have attributed this type of ventures in several ways such as *sharikah fi ‘amal bi aydihimā* (a partnership of work with their hands), *al-sharikah bi ‘l-‘amal* (a partnership in work), *sharikat al-abdān* (a partnership of bodies), *sharikat al-ṣanā’i‘* (partnership of crafts) and *sharikat al-taqābul* (a partnership of acceptance).¹²² Therefore, it can be said that a partnership of acceptance is when two craftsmen form a partnership in the acceptance of work such as tailoring and the like. It is also designated as the partnership of bodies because they work with their bodies in a partnership of craft because their craft is their capital.

Al-Sarakhsī has articulated the arguments in favour of labour partnership. He argues that the element of agency (*wakālah*) is realizable and can serve as the basis for the validity of such a transaction. The concept of agency is the cornerstone of contractual partnership in Ḥanafī law which is equivalent to that of joint ownership in Shāfi‘ī partnership law. Any commercial transaction for which the

¹²¹ *Partnership*, p.65

¹²² *Badā’i‘*, vol.VI, p.56; *Mabsūṭ*, vol.XI, p.152. Prof.Schacht has suggested that the translation of the term *taqābul* for partnership is inappropriate. Instead, the contextual meaning of "*taqabbalā*" in connection is the acceptance by one of both the partners of some raw material belonging to a third party for the purpose of undergoing some process of manufacture like a tailor accepts cloth belonging to his customer in order to cut and sew it into a garment.

appointment of an agent is valid is also valid for the formation of partnership.¹²³ He further asserted that labour can be equated with money as a source of profit. He establishes a *qiyās* on the basis of *muḍarabah*, to justify his opinion, as there is a common *‘illah* in the two cases, that claiming profit based on one’s work and craft has a cogent legal foundation. A historical evidence has also been adduced in support of the two preceeding theoretical arguments. Sarakhsī contended that: “From the time of the Prophet Muḥammad, people have practiced this form of partnership without criticism or admonition.” The implication here is that if there were anything legally objectionable in a labour partnership, the Prophet would have outlawed its use.

For the purpose of analysing the role of *ḍamān* in such a relationship, it is essential to survey the nature of the rights and liabilities supplicated in labour partnership. In this respect, al-Kāsānī offers his view : the reward in this labour partnership derives from the liability for the work undertaken, and not from the execution of the work itself.¹²⁴ This standpoint, according to Udovitch is a refinement of Sarakhsī’s ideas on the issue of the communality of the labour partnership wherein, distribution of profits and losses need not bear any relationship to the distribution of actual labour. This principle is rather ambivalent as the method of measuring investment in a labour partnership is not expressed in terms of amount or quality of work invested but the extent of liability undertaken by each partner. Despite that, as a flexible school and being responsive to the the practical need of trade, the Ḥanafīs exercise their *ijtihād* to offer practical solutions to people.

¹²³*Mabsūṭ*, vol.XI, p.155.

¹²⁴*Badāʾiʿ*, vol.VI, p.76-77.

One of the cases dealt with is the association between a craftman and a stall-owner. This explanation of it reflects the Ḥanafī's jurisprudential outlook in dealing with a situation of dilemma between legal impediments and practical need and the extent of the role of *uṣūl al-fiqh*:

"If an artisan takes another man into his stall with the intention of assigning all the work to the latter on a half profit basis, this arrangement is, by analogy, invalid. This is so because the investment of the stall-owner consists intangible property and intangible properties are not suitable for partnership investment. If it is the stall-owner who accepts the work, the artisan is his hired man on a half profit basis. This last sum, however, is indefinite, and ignorance of the wage invalidates a hire contract. If on the other hand, the artisan himself accepts the work, he becomes a lessee of the stall to the extent of one half of the proceeds of his work. This sum again is unknown, and the lease contract is therefore invalid. By exercising juristic preference (*istiḥsān*), he (referring to Shaybānī) permitted this arrangement because of its continuous use in the affairs of men without any disapproving voice raised against it.....For example, if an artisan arrives in a certain town, its inhabitants will not know him and will not entrust him with their merchandise. They will, however, entrust their merchandise to a stall-owner, whom they know. As a rule, the stall-owner will gratuitously provide the likes of his service to an artisan. The validation of these services achieves the desired end of all parties concerned. The artisans receives compensation for his labour; the people derive the benefits of his services; and the stall-owner receives compensation for the use of his stall. The contract is permissible.....the basis for the permissibility is like that underlying the permissibility of *salam* contract the requirements of the law is abandoned in face of the people's need."¹²⁵

3.12 *Damān* in the Contract of *Muḍārabah* (Commenda).

*Muḍārabah*¹²⁶ or *commenda* is a contract that combines resources, both financial and human, for the purpose of trade. This legal instrument has been prac-

¹²⁵*Mabsūṭ*, vol.XI, p.159.

¹²⁶The word *muḍārabah* is synonymous to *qirād* and *muqāraḍah*, and has been used interchangeably, with no essential difference in the conceptual meanings. The geographical factors are the likely reason for the divergence. In the Arabian peninsula, this type of transaction is known as *qirād* whereas in the 'Irāqī provenance the term *muḍārabah* is used. See *Sales*, p.227.

tised from the time of the Prophet by the evidence that the Prophet himself was an agent-manager (*muḍārib*) of Khadijah's property. A tradition attributed to the Prophet Muḥammad conveyed an unequivocal endorsement and approval of those engaging in trade by means of a *muḍārabah*. The Prophet was sent at a time when people were using *muḍārabah* in their dealings and he confirmed them in this practice. 'Ā'ishah and 'Abdullah b. 'Umar were reported to have invested money of orphans and other money left in their safekeeping in *muḍārabah*. Ibn Mas'ūd, a prominent Companion of the Prophet, and 'Abbās b. 'Abd al-Muṭṭalib, the uncle of the Prophet, engaged in *muḍārabah* trading, the latter having obtained Muḥammad's approval for the conditions he imposed upon agents to whom he entrusted his money.¹²⁷ Practising *muḍārabah* increased in the Muslim world especially during the medieval period.¹²⁸

"It appears very likely that the *commenda* was an institution to the Arabian peninsula which developed in the context of the pre-Islamic Arabian caravan trade. With the Arab conquests, it spread to the Near East, North Africa and ultimately to Southern Europe. The *commenda* was subject of lengthy and detailed discussion in the earliest Islamic legal compendia (late eighth century). Its legal treatment in these early treatises bears the hallmark of long experience with the *commenda* as an established commercial institution."¹²⁹

Trading ventures in *muḍārabah* are an arrangement in which a capital provider or investor (*ḍārib*) or a group of investors entrusts capital or merchandise

¹²⁷*Mabsūṭ*, vol.XXII, p.18.

¹²⁸This holds true not only in the medieval Muslim world but also in medieval West. It has been proven that in Islamic law and in Western commercial practice these two institutions were the chief methods for pooling capital and bringing together investors and managers. See Robert S.Lopez and J.W.Raymond, *Medieval Trade in the Mediterranean World*, New York, 1955, p.175. For specific discussion on medieval Islām see S.D.Goitien, "Commercial and Family Partnerships in the Countries of Medieval Islām," *IS* 3 (1964), pp.315-337.

¹²⁹*Partnership*, p.172. Also see Udovitch account on various commercial operations known in Islamic law in his "Commercial Techniques in Early Medieval Islamic Trade," in D.S.Ricards (Ed.), *Islām and the Trade of Asia : A Colloquium*, Oxford and Pennsylvania, 1970, pp.37-39.

to an agent-manager or entrepreneur, who is to trade with it and then return to the investor(s) the principal and a previously agreed share of profits. The agent-manager will receive a certain share of the profit as a remuneration for his labour and skill. The agent's complete freedom under normal trading circumstances from any liability for the capital in the event of partial or total loss and the disjunction between the owners of the capital and third parties are novel and distinctive features of *muḍārabah* which made it a particularly suitable instrument for long-distance trade.¹³⁰ A merchant in one city might have agents in another and although organised banks did not exist, there were various ways in which credit could be given over long distances, for examples by drawing of bills.¹³¹

The nature of responsibilities concerning a *muḍārabah* transaction is summarised by 'Alī Ḥaydar:

"*Muḍārabah* has seven regulations, [viewed] from different perspectives. [In some instances] the *muḍārib* (agent-manager) is a trustee¹³². He is also [treated as] the *wakīl* (agent) of the investor by virtue of his use of the capital. As far as the *ribḥ* (profit), he is a *sharīk* (partner) if such is being achieved. If he breaches the terms and conditions set by the investor, he is like a *ghāṣib* (usurper). If it is stipulated that he will take all the profit, he is seen as *mustaqriḍ* (a person seeking for loan). However, if the investor stipulates taking all the profit, the *muḍārib* is a *mustabḍī* (caretaker). In the situation where a voidable *muḍārabah* is concluded, the *muḍārib* would become an *ajīr* (employee)."¹³³

In looking into the question of *ḍamān*, it is important to analyse the nature of the *muḍārib*'s position in the transaction. His holding of the *muḍārabah* capital is treated on the same basis as in the case of *wadī'ah*, in certain respect such as his

¹³⁰Partnership, p.171. On the role of commenda in the expansion in the expansion of medieval Mediterranean trade see Udovitch, "At Origins of the Western Commenda : Islām, Israel, Byzantium?", *Speculum* (1962), vol.XXXVII, pp.198-207.

¹³¹Albert Hourani, *A History of the Arab People*, p.112. Cf.Chapter IV and V, supra. On the use of negotiable instruments see Chapter II, infra.

¹³²*Maj. 'Adliyyah*, art.1413.

¹³³*Durar*, vol.III, pp.462-463.

non-liability for any destruction without his transgression and negligence. However, the exception is, the *muḍārib* is allowed to deposit the capital with another party, unlike in the case of *wadī'ah*.¹³⁴ His other role as an agent has given him the authority to make such a decision. If the capital is destroyed without his transgression or negligence, he is not liable as he is in the position of an *amīn*. If the capital is destroyed before any work is done, the *muḍārabah* contract is annulled and the testimony of the *muḍārib* together with his oath is admissible, as far as the destruction is concerned.¹³⁵ As regards to the consumption of the capital by the *muḍārib* when he has spent it on another person or he has given it to someone else who spent it, he is not allowed to purchase anything associated with the *muḍārabah* until the money used has been replaced.¹³⁶

a) Conduct of the Muḍārabah

To judge from the considerable attention they receive in the legal sources, the most problematic aspects of the operation of *muḍārabah* are those concerned with the agent's conduct of the *muḍārabah* trade. By far the largest portion of the legal discussion is devoted to elaborating and defining the extent of the agent's freedom of action and to clarifying his relationship to the investor and to third parties.

¹³⁴Cf. art.790 of *Maj. 'Adliyyah* on the matter. His position as a trustee is by virtue of the permission of the investor for him to hold the property. The transaction is not for any other purpose like in the contract of exchange (*mubādalah*) or in the contract of security (*tawthīq*). See *Naz.Ḍamān*, p.158.

¹³⁵*Naz.Ḍamān*, p.159. See the relevant maxim: "*Al-qawl qawl al-wakīl fī nafy al-ḍamān wa īṣāl al-amānah li ṣāhibiha*" cited in Maḥmūd Ḥamzah, *al-Farā'id al-Bahiyyah*, p.99. The Ḥanbalīs *Maj. Shar'iyyah* art.1878 however ruled that: "The testimony of the agent about mistake, deceit and forgetfulness is inadmissible."

¹³⁶*Majma'*, p.303; *Muhadhdhab*, vol.I, p.388; *Mughnī*, vol.V, p.69. Also see *Naz.Ḍamān*, p.159.

The explanation takes place within the same framework as those concerning the rights and duties of a partner in his conduct of partnership business. Like partnership, the *muḍārabah* is classified as a contract of fidelity (*‘aqd al-amānah*). Like a partner, the agent is considered a trustworthy and faithful party (*amīn*) with respect to the capital entrusted to him and therefore not liable for any loss occurring in the normal course of business activities; and like a partner, the agent becomes liable for the property in his care as a result of any violation of this fidelity (*amānah*).¹³⁷

It is interesting to note that there has been a number of guidelines on the agent’s freedom of action which will be the strongest criterion should *ḍamān* need to be applied. Generally, his actions must be consonant with the over-all purpose of the contract, namely, that of achieving a profit and they must fall within the bounds of recognized and customary commercial practice. More specifically, his freedom of action depends on the type of mandate he receives from the investor and on whether or not any specific condition or limitation are imposed at the time the contract is negotiated. It can be in the form of a limited or unlimited mandate.

As far as an unlimited mandate is concerned, the investor has authorized the agent to act completely at the latter’s discretion in all business matters. Such authorization is conveyed by the investor’s statement to the agent : “Act with it (the investment) as you see fit (*i‘mal fīhi bira‘yik*)”. Al-Sarakhsī analyzes this as follows :

¹³⁷ *Partnership*, pp.203-204.

"If the investor says to the agent, "act with it as you see fit," then he may practice all of these things except the loan.¹³⁸ For the investor has consigned the control of his capital to the agent's discretion in a comprehensive way; and we know that his intention is the inclusion of all the customary practice of the merchants. The agent, thereby, has the right to engage in *mudārabah*, a partnership and to mingle the capital with his own capital because this is of the practice of the merchants."¹³⁹

Udovitch has suggested that this comprehensive and unrestricted mandate permits the agent the widest latitude *vis-a-vis* the techniques of commerce he may employ in the pursuit of profitable trade. He is free to transmit this unrestricted mandate to a second agent and the second agent is equivalent in this respect to the original agent. In the absence of any blanket authorization, the agent's freedom of action is somewhat restricted, especially with regard to transactions with third parties. If the investor does not use the phrase "act according to your judgement" or a substitute phrase conveying the same intention, the agent may not engage in any practice involving mingling the capital with his own resources, giving *mudārabah* to third party and to invest the capital in a partnership with a third party.¹⁴⁰

¹³⁸There are nine types of freedom given to the agent: 1.To buy and sell all types of merchandise as he sees fit; 2.To buy and sell for cash and credit; 3.To give goods as *biḍā'ah* i.e leaving them as a deposit or pledge; 4.To hire helpers as needed; 5.To rent or buy animals and equipment; 6.To travel with capital; 7.To mingle capital with his own resources; 8.To give the capital as a *mudārabah* to a third party and 9.To invest the capital in a prtnership with a third party. A loan is excluded from this list as it is not treated as practice of merchants. It is viewed as a favour on the other part of the lender and not as a commercial transaction from which some advantage can be expected. Cf. *Maj. 'Adliyyah*, art.1414 and details in *Durar*, vol.III, pp.465-469.

¹³⁹*Mabsūṭ*, vol.XXII, p.39-40 as cited in *Partnership*, p.204.

¹⁴⁰For details see *Partnership*, pp.204-205. Wahbah al-Zuhaylī said: "The liability will not fall on the agent, neither by virtue of the handing over of the capital to a second *mudārib* nor by the use of the capital by the second agent until he secures profit...if he secures profit, then the first agent is responsible. This is the opinion of Abū Ḥanīfah. Zufar opined that liability arises by mere handing over of the capital. Abū Yūsuf and Muḥammad al-Shaybānī [whose opinion is considered the most preferred within the school] ruled that: "Whenever the second agent started working with the capital, regardless of attainment of profit, the first agent will be liable. This is because the second agent is disposing the property of another without the owner's permission (*fa qad taṣarraf bi ghayr idhn al-mālik*). The investor has the right whether to impose *ḍamān* on the first or the second agent. The first agent is liable by giving the capital to the second agent whereas the second agent is liable by virtue of possessing the capital. If the first agent accepted responsibility, he will have to

On the other hand, the Mālikīs ruled that the agent is entitled to give the capital to any other party on *muḍārabah*, only with the permission of the investor.

“Mālik spoke about an agent who took *qirāḍ* money from a man [the investor] and then gave it to another man [the second agent] to use as a *qirāḍ* without the consent of the investor. He said, “The agent is responsible for the property. If it is decreased, he is responsible for the loss. If there is a profit, the investor has his stipulation of the profit and then the agent has his stipulation of what remains.”¹⁴¹

The Shāfi‘īs have similar regulations on the question of the two-tier *muḍārabah*. The agent is not allowed to enter into a *muḍārabah* agreement with another party without the permission of the investor. If this has been done, the contract becomes void.¹⁴² Despite the general trend within the school to disallow this kind of arrangement, there are certain Shāfi‘ī jurists like al-Shirāzī¹⁴³ who opined that such practices should be allowed.¹⁴⁴

In a limited mandate *muḍārabah* contract, the agent’s freedom of action is regulated by the terms and conditions set by the investor. The agent must respect those restrictions. However, it is required that the restriction must be beneficial to the investor. If the agent goes beyond what is permitted or acts contrary to the

undertake it. However, if the second agent accepted the responsibility, such responsibility is reverted to the first agent, as he had deceived the second agent about the capital. This is in line with the decision of the Mālikīs, the Shāfi‘īs and the Ḥanbalīs that *ḍamān* is affirmed by the outcome (*natijah*) i.e. when the capital is destroyed without any infringement, the liability is on the first agent if the second agent is not aware that the capital does not belong to the first agent.” See *Naz. Ḍamān*, pp.142-143.

¹⁴¹*Muwaṭṭa’*, p.284.

¹⁴²*Wajiz*, vol.I, p.223.

¹⁴³See his *Muhadhdhab*, vol.I, p.390.

¹⁴⁴Siddiqi, op.cit., p.52.

conditions, he becomes a *ghāṣib*. As a result, the profit and loss from the venture falls on himself. If the capital is lost, he is responsible.¹⁴⁵

While commenting on business methods, al-Dimashqī said, concerning *muḍārabah*: “The agent is not bound to indemnify the investor for accidental loss of the investment so long as he does not go beyond the localities agreed upon.”¹⁴⁶ This did not apply to all *muḍārabah*; it was only true for cases in which a geographical limitation on the agent’s activities was specifically included in the agreement. This was but one of a variety of specific restrictions that the investor could impose on the agent. These specific restrictions could appear in a limited as well as in unlimited mandate *muḍārabah* and could relate to the place, object and method of trade. The only requirement was that the restriction be what al-Sarakhsī terms a “beneficial stipulation” that is, a useful and beneficial condition from the investor’s point of view. He said that imposition of a geographical restriction fulfilled the notion of “beneficial stipulation” (*shart muftid*), since the investor might have considered it desirable to have quick and direct access to his capital. In such a case, the agent may not move the capital out of the restricted area or transfer it to anyone else who would do so. If he does so, he becomes liable for any loss.¹⁴⁷ An explicit restriction to work only in a specific market or a specific place in the market, is normally construed in an economic and not strictly geographical sense that is as an injunction to trade only at the general price level of that market.

“If the investor entrusts him with a *muḍārabah* on the condition that he works with it in the market of Kūfah, and the agent works with it in Kūfah but not in that place, then according to analogy he is a violator and liable because he violated a stipulation imposed upon him by the investor. But by *istiḥsān*, his transactions are effective in

¹⁴⁵*Maj. ‘Adliyyah*, arts.1420-1421.

¹⁴⁶See his *Kitāb al-Ishārah ilā Maḥāsin al-Tijārah*, pp.1-30.

¹⁴⁷*Mabsūṭ*, op.cit., p.40.

the *muḍārabah* and he is not liable. Because a stipulation which is not beneficial is not taken into consideration and there is no benefit in confining his transactions to the market. For the investor's intention applies to the price level of Kūfah, not the market place itself; any place in Kūfah in which he transacts business, his transactions conform to that which the investor stipulated. Do you think that if the investor instructs him to work in the house of fulān and he works in some other place that he will be liable ? He will not be liable for anything in this connection by reason of the unity of the city."¹⁴⁸

In this regard, Udovitch pointed out that the imposition of geographical restriction in a *muḍārabah* contract transforms its function from that of an instrument primarily facilitating long-distance trade into a means of investment for local trade. It permitted the investor quick access to his capital instead of waiting for the agent to return from a journey of undetermined duration. The investor could at any time instruct the agent to convert the investment into cash, retrieve his capital and hopefully some profit and then invest it elsewhere. It would also involve less risk and uncertainty since trade would be carried on in economic circumstances and within a price structure with which the investor was familiar. Conversely, the rate of profit would undoubtedly be lower; nevertheless, the *muḍārabah* with a geographical restriction could transform the *muḍārabah* into a satisfactory means for short term investment.¹⁴⁹

b] Distribution of Liabilities

Another feature of *muḍārabah* which has been considered an innovation and a distinguishing aspect from other form of commercial association known and prac-

¹⁴⁸Ibid., p.48.

¹⁴⁹Partnership, pp.211-212.

ticed in the medieval Islamic world, was its treatment of the distribution of liability between the parties to the contract. Some legal writers pointed out that the joint capital may be missing in this type of venture. Consequently, one party, the agent was not liable for any part of the investment in case of loss and the other party, the investor, except under exceptional circumstances, did not become jointly liable with the agent in transactions with third parties who need not even have known of the investor's existence. Since it can always be assumed that *muḍārabah* found its most frequent employment in long-distance trade, which of necessity geographically separated two parties for most of the contract's duration this distribution of liability between parties would appear to have been ideal for this purpose.

With their customary thoroughness, the Islamic lawyers probed all aspects of the principles governing liability distribution in the *muḍārabah* by confronting them with numerous hypothetical situations. While the specific cases constructed by the lawyers may have had little or no significance in actual commercial practice, they are noteworthy for the light they shed on the relationship between the agent and outside third parties as well as between the agent and investor to each other.¹⁵⁰

The concept of the agent as a trustworthy party (*amīn*) is the cornerstone upon which the structure of equity within the *muḍārabah* contract rests. Any arrangement involving the agent's liability for the investment was by definition disqualified as a *muḍārabah* contract. On the other hand, the investor, who does not work with the capital, was entitled to a share of the profit only by virtue of the risk

¹⁵⁰*Partnership*, p.238.

of possible loss which he faced.¹⁵¹ Therefore, the investor risks only his capital and the agent risks only his time and effort.

“For everything the agent takes from the investor is part of the *mudārabah* investment. And since the capital in the agent’s possession is part of the *mudārabah*, he stands in relation to it as a trustworthy party (*amīn*). For *mudārabah* capital cannot be a source of liability (*maḍmūnan*), if it is a source of liability to him, the contract will not be a *mudārabah* and the investor will have no claim for a share in the profit. How can the investor claim a share of the profit while the agent is liable for the capital.”¹⁵²

In the case of repeated loss when the investor has to provide an additional sum to that of the original investment to allow the agent to restore the total investment capital, obviously the investor will have to face a greater risk as represented by the increased extent of his financial involvement. Nevertheless, this is parallel to the increased time and effort required from the agent before he could hope to realize any profit.¹⁵³

If the loss of the capital took place after the agent had succeeded in parlaying the original investment into a larger sum, the procedure of distributing the liability would be different, as in the case of loss at the initial stage. Once the original investment has increased as a result of the agent’s activities, the latter is

¹⁵¹*Maj. ‘Adliyyah* art.1425 provides that the *mudārib* is only entitled to profit as the equivalent for his work. In art.1426, it was mentioned that the right to profit of the investor is from his property.

¹⁵²In the event of loss of the *mudārabah* property, it is suggested that it should be covered from the profit that might be achieved not from the capital. However, if it exceeds the amount of the profit and is set against the capital, the *mudārib* is not responsible for it. In every case of damage or loss of value, the investor will have to bear them. Even if a condition has been made that the *mudārib* has to share the loss, no attention is paid to the condition. See *Maj. ‘Adliyyah*, arts.1427-1428. Ibn Rushd is quoted to have said [in his *Bidāyat al-Mujtahid*, vol.II, p.140] that there has been a consensus among the jurists on the matter. He also stressed the importance of utilising the profit first of all to offset the loss incurred before resorting to other options. See M.N.Siddiqi, *Partnership and Profit-Sharing in Islamic Law*, p.30.

¹⁵³*Partnership*, p.241.

considered part owner of the capital even if the *muḍārabah* is still ongoing. His ownership consists of that sum which would constitute his share of the profit were the *muḍārabah* to be concluded at that moment. Consequently, in the event of loss, the agent and not the investor, would be liable for that share.¹⁵⁴

As a matter of precaution, in the pursuit of protecting the investor's right, the agent is put under certain trading restriction. He is not permitted to engage the *muḍārabah* for any sum greater than the sum in hand. If he exceeded these bounds in any way, the agent became liable for any sum in excess of the *muḍārabah* capital. The prohibition against *istidānah* (incurance in debt), the commercial commitment of the *muḍārabah* by the agent in excess of its capital, carried along with several corollary restriction on the agent's activities. For instance, he is not allowed to amplify his working capital by negotiating a loan for the *muḍārabah*. Nor could he, at the *muḍārabah* expense, alter or improve any of the goods he purchased if their acquisition alone had required all the available capital.¹⁵⁵

Istidānah is only allowed with an express authorization by the investor that is for the agent to incur debts in excess of the *muḍārabah*. However, there is a difference in the status of the goods bought with the actual *muḍārabah* investment and those procured over and above that amount. Goods acquired by the agent on credit above and beyond the amount of *muḍārabah* capital are not subject to the principle of ownership and liability obtaining in a *muḍārabah* agreement. The ownership, risk and profit are shared jointly by the agent and the investor, thus in practice constituting a credit partnership.¹⁵⁶ The combination of contracts provided for a

¹⁵⁴*Partnership*, pp.241-242.

¹⁵⁵*Mabsūṭ*, vol.XXII, p.75.

¹⁵⁶This has created a conjunction between two separate Islamic forms of commercial association that is *muḍārabah* and the credit partnership. See *Partnership*, p.244.

considerable extension in the scope of the *muḍārabah*'s commercial effectiveness. Armed with the investor's authorization to engage into *istidānah*, the agent would be in a position to take advantage of various promising commercial opportunities that might require a larger volume of capital than that furnished by the investor. By using the actual *muḍārabah* as a base, he would probably find himself in a more favourable position to obtain credit and thus to increase the profitable returns of the venture.¹⁵⁷

Any invalid *muḍārabah* is treated as a hire contract (*ijārah*). All profits accrue to the investor and all losses are borne by him. The agent's personal expenses, but not his business expenses, are borne solely by the agent, who in turn, as an employee, is entitled to an equitable wage.¹⁵⁸ The grounds for declaring a *muḍārabah* invalid are numerous and can be connected with almost every aspect of the contract. These include provision for a non-proportional division of profit; non-alienation of the investment on the part of the investor and the agent's violation of a legitimate restriction placed on him by the investor. In all such cases, the nature of the contract has been transformed. The investor's position becomes that of an employer, responsible for his goods and property and fully entitled to all profit from it. The agent's role is changed to that of a simple employee, entitled to remuneration for his time and effort regardless of whether his exertions on behalf of his employer are successful.¹⁵⁹

¹⁵⁷*Partnership*, pp.244-245. Also see Udovitch, "Credit as a Means of Investment in Medieval Islamic Trade", *JAOS*, 87 (1967), 260-264 and "Reflections on the Institutions of Credit and Banking in the Medieval Islamic Near East" *SI*, 41 (1975), pp.5-23.

¹⁵⁸*Mabsūṭ*, vol.XXII, p.67; *Introduction*, p.156; *Maritime*, p.88.

¹⁵⁹*Durar*, vol.III, pp.462-463.

Although *muḍārabah* could be terminated by the will of either party at any point, no time limit for the duration of the agreement could be stipulated at the outset.¹⁶⁰ It was envisaged that *muḍārabah* would be normally be concluded when the agent returned from his travels or when he completed his series of transaction profitably. At that time, he returned his capital to the investor and the remainder, that is the profit, would be divided between them according the proportion agreed upon at the initiation of the contract. The *muḍārabah* was then considered dissolved. Udovitch has prudently said:

“The return of the capital to the investor is crucial. In this respect, there is a kind of symmetry at both temporal poles of the contract. Just as *muḍārabah* could not begin without the investor relinquishing control over his capital and handing it over to the agent, so too, did its conclusion depend on the agent’s restoring it in full to the physical possession of the investor. If for some reason, the investor and the agent divided only the profit, while the amount equivalent to the investment remained in the agent’s hand and the latter continued to trade with it, the original *muḍārabah* was considered as continuing in force. Were the agent subsequently to suffer any business reverses, he would be required to return part or even the entire amount of his share of the profit until the amount of the original capital was entirely made good to the investor.”¹⁶¹

On this matter, Siddiqi pointed out that the parties in a *muḍārabah* can claim their share of profit only when those who supplied the original capital have had their investment returned to them in full, whether in the form of cash or in the form of legal transfer. He further said that the notion of “restoration” of the original capital theoretically means where the original capital is handed back to the investor and it is the most preferable practice. Another form is where the original capital is available as cash but not actual transferred to the investor’s hand, but under his control. As such, control is the real meaning of ownership as most jurists

¹⁶⁰*M. Muḥtāj*, vol.II, p.312; *Wajīz*, vol.I, pp.221-222.

¹⁶¹*Partnership*, p.246.

have understood it as equivalent to proper restoration. However, a *de jure* return of the original capital to the investor, the distribution of profit and loss of the venture becomes final and complete.¹⁶²

Muzāraʿah (sharecropping) is a kind of partnership, where the land comes from one party and the cultivation of it will be carried out by another party, wherein they will share the crops among themselves.¹⁶³ It was suggested that *muzāraʿah* could be classified as a quasi-*muḍārabah* contract, because it has some features and characteristic of a *muḍārabah*.¹⁶⁴ Therefore, in looking into the question of *ḍamān*, the preceding discussion on *muḍārabah* could be used. Aḥmad ibn Ḥanbal, according to Ziaul Haque, unlike the *imāms* of other schools, strictly applied the method of analogy of *muḍārabah* on land and concluded that *muzāraʿah* for one third or one fourth of the crop is valid. In this case, the seed is supplied by the landlord and the *dākhil* (tenant, sharecropper) contributes his labour and draught animals, similar to the case of *muḍārabah*. As a consequence, the tenant is responsible for his labour, his ancillary apparatus and animals, whereas the landlord provides the land and seed.¹⁶⁵ It is a condition that the land is fit for cultivation and is handed over to the tenant for the work to be carried out. Failing the fulfil the said conditions will render the *muzāraʿah* as invalid.¹⁶⁶ In

¹⁶²Siddiqi, op.cit., p.36. As regards the returning of the capital and the profit, there is a possibility of dispute between the parties involved. Based on his analysis of classical sources, Hassan that if the agent claims that he has brought the profit with the capital, without any evidence, the testimony of the investor who has otherwise claimed, is admissible. Only upon the producing of the evidence, the testimony of the agent will be accepted. See the discussion in *Sales*, p.242.

¹⁶³*Maj. ʿAdliyyah*, art.1431.

¹⁶⁴*Sales*, p.255. The question of *muzāraʿah* is quite complicated as it has been associated with various kinds of other types of agricultural sharecropping. For detail treatment on the development of the substantive law of *muzāraʿah* see Ziaul Haque, *Landlord and Peasant in Early Islam*, pp.310-346.

¹⁶⁵*Ibid.*, p.336.

¹⁶⁶*Maj. ʿAdliyyah*, arts.1436-1437. Cf. *Maj. Sharʿiyyah*, art.1990.

such a situation, the harvest, if any, belongs entirely to the owner of the seed. If the other one is the landlord, he takes the rent and if he is the tenant he takes a fair wage.¹⁶⁷

PART THREE : ḌAMĀN IN CONTRACTS OF MIXED ELEMENTS

This is the third class of legal relationships wherein *ḍamān* has been adopted as an integral part especially in the situation where remedies and settlements are needed. As in the aforementioned transactions *ḍamān* is based on contractual obligation and the fiduciary relationships between parties, the '*aqd al-muzdawaj al-athar*' combines both of them together. This class of contract, in this respect, will be mainly concerned with the contract of hire (*ijārah*) and the contract of pledge (*rahn*).

3.13 Contract of Lease or Rent

Literally, *ijārah* is a derivative of *ajr* or *ujrah* (rent or salary) which means substitute, compensation, recompense, indemnity, consideration, return or counter value (*'iwad*). Technically, *ijārah* is a contract of proposed and known usufruct with a specified and lawful return or compensation for the effort or work which has been initiated.¹⁶⁸ However, it is clear that the variety of terms used is due to variety of economic purposes involved. It represents, as Schacht has shown, a

¹⁶⁷*Maj. Adliyyah*, art.1439. Cf. *Maj. Shar'iiyyah*, art.1994.

¹⁶⁸There are a few other terms used to denote the practices similar to that of *ijārah*. According to Schacht the term *kirā'* has been used as it corresponds the Roman *locatio conductio rei*. See *Introduction*, p.21. According to Emile Tyan, the terms *isti'jār* and *kirā'* has also been used but they are less popular. See E.Tyan, "*Ijārah*", *EI*(2), vol.III, p.1017.

combination of three formerly separate transactions, *kirā'* the renting of real property, *ijārah* the hiring of salaried labour and *ju'l* the rendering of services.¹⁶⁹

Ijārah has been practised in the Jāhiliyyah time, and there are various historical evidences for it. It has been reported by Ibn Hishām, that Ḥalīmah al-Sa'diyyah has been hired as wet-nurse to the Prophet. Before his prophethood, the Prophet has been employed as a shepherd with his foster brother, among the tribe of Banī Sa'd.¹⁷⁰ Its legality has been mentioned in various places in the Qur'ān, *inter alia*, God said in affirming the *ijārah* law that had been practised during the time of Prophet Mūsā :

"Said one of the (damsels): O my (dear) father, engage Him on wages, truly the best of men for thee to employ is the (man) who is strong and trusty. He said : I intend to wed one of mu daughters to thee on condition that you serve me for eight years.¹⁷¹

The Qur'ān also speaks about the permissibility of wet-nursing : "And if they suckle your (off-spring) give them their recompense"¹⁷² Similarly, another verse reads: "There is no blame on them if ye decide on a foster-mother for your off-spring, there is no blame on you provided that you pay (the mother) what you offer on equitable term."¹⁷³ Since *ijārah* has been allowed in such a trivial matter, it should similarly be sanctioned by the law in a more complicated transaction.¹⁷⁴

¹⁶⁹Introduction, p.21. Also see Barber Johansen, *The Islamic Law on Land Tax and Rent : The Peasants' Loss of Property Rights as Interpreted in the Ḥanafite Legal Literature of the Mamlūk and the Ottoman Periods*, pp.1-12.

¹⁷⁰Ibn Hishām, *Strah Ibn Hishām*, pp. 150-154.

¹⁷¹Q, al-Qaṣaṣ (28) : 26-27.

¹⁷²Q., al-Ṭalaq (65) : 6.

¹⁷³Q., al-Baqarah (2) : 233.

¹⁷⁴*Badā'i*, vol.IV, p.173. Also see Sharaf 'Alī al-Sharīf, *al-Ijārah al-Wāridah 'alā 'Amal al-Insān : Dirāsah Muqāranah*, pp.36-37.

The Sunnah has further affirmed the Qur'ānic injunctions on *ijārah*, either by the Prophet's sunnah in form of deed, statement or his tacit approval. In one ḥadīth, 'Āishah said: "The Prophet and Abū Bakr hired a man from Banī al-Dayl, who was an expert on the (alternative) route (to Madīnah).¹⁷⁵ There is a ḥadīth reported from the Prophet in which he was reported to have said : "Give the employee his wage before his sweat dries".¹⁷⁶ In practice, it has been witnessed that the Prophet saw *ijārah* being practiced during his time and he had no objection to it.¹⁷⁷

Ijārah has also being sanctioned by *ijmā'* of the first generation of Islām (*salaf al-ṣāliḥ min al-ṣaḥābah wa al-tābi'in*) and all the *fuqahā'* of that era as well as the later generation of leading *madhāhib* formed in the later part.¹⁷⁸ Al-Kāsānī declares that there has been an *ijmā'* (consensus) on the matter before the emergence of al-Aṣam¹⁷⁹, wherein they believe that the contract of *ijārah* from the time of the Prophet until now was without objection. God has legalised various contracts to meet the need of people and their need for *ijārah* is overwhelming.¹⁸⁰

An on going polemic concerning *ijārah* rests on the nature of its legalisation, whether it is on the basis of *khilāf al-qiyās* (against the established principle) or *wifq al-qiyās* (corresponding to the established principle). The first group argues on the notion of *bay' al-ma'dūm* (sale with absent object of contract)¹⁸¹ as it is

¹⁷⁵Ibn Hajar al-Asqalānī, *Fath al-Bārī bi Sharḥ Ṣaḥīḥ al-Imām al-Bukhārī*, vol.III, pp.442-443.

¹⁷⁶al-Zayla'ī, *Naṣb al-Rāyah li Aḥādīth al-Hidāyah*, vol.IV, p.129.

¹⁷⁷*Badā'i'*, vol.IV, p.174.

¹⁷⁸Ibn Rushd, *Bidāyat al-Mujtahid*, vol.II, p.183.

¹⁷⁹He is Abū Bakr al-Aṣam, one of the member of a group opposing the legality of *ijārah* on ground of gharar.

¹⁸⁰*Badā'i'*, vol.IV, p.174.

¹⁸¹Some scholar has translated *bay' al-ma'dūm* as sale of a non-entity. See Kamila Tyabji, *Limited Interest in Muhammadan Law*, Steven and Sons Limited, London, 1949.

unacceptable in Islamic law by virtue of the ḥadīth [*lā tabi‘ mā laysa ‘indaka*]¹⁸² The dissenting group’s argument lies in the fact that *ijārah* is not a contract of sale in the strictest sense of the word. This is because in *ijārah* is not contracting on physical object of contract but rather a usufruct (*manfa‘ah*), the presence of which in a contract of sale is impossible. Despite the jurisprudential debate, it can be easily seen in light of the *ḥikmat al-tashrī‘* that permission for *ijārah* is a sign of God’s mercy to mankind and suitable for the needs of human society. God said in the Qur’ān, in affirmation of the idea of avoiding burden (*qillat al-taklīf*): “God intends every facility (*yusr*) for you. He does not want to put you to difficulty (*‘usr*)”¹⁸³. He further said : "He has chosen you and has imposed no difficulties on you.”¹⁸⁴

a) Classification of Ijārah Contracts

The classical texts of Islamic law have classified *ijārah* into two different types, namely *ijārat al-‘ayn* (hire of property or corporeal asset)¹⁸⁵ and *ijārat al-shakhṣ* (labour, employment or service)¹⁸⁶ It has been embodied in the rules of *ijārah* that it must be contracted with the consent of both parties who have absolute knowledge of the usufruct. As it is a type of sale, the general principle of contract has categorically prohibited *gharar* transactions.¹⁸⁷ Hired goods or work must become possible for delivery or executed legally and practically at a certain time.

¹⁸²al-Shawkānī, *Nayl al-Awṭār*, vol.V, p.175.

¹⁸³Qur’ān, *Surah al-Baqarah* (2) : 185.

¹⁸⁴Qur’ān, *Surah al-Ḥajj* (22) : 78.

¹⁸⁵It is also referred to as *manfa‘ah al-‘ayn*. See *Sales*, p.423.

¹⁸⁶The term *manfa‘ah al-‘amal* is also used to signify this concept. See Emile Tyan, *Ijārah*, EI[2], vol.III, p.1017.

¹⁸⁷al-Ṣiddiq Amīn al-Ḍarīr, *al-Gharar wa Atharuh fī ‘l-Fiqh al-Islāmiyy*, 1976. Also see *Sales*, p.424.

In other words, the capability of handing over the hired goods fully or completely, for usufruction is an essential requirement in *ijārah*.¹⁸⁸ Further, the law also requires that the usufruct must be lawful and contracted for legitimate purposes. The price or rate of hiring or renting of a property should be made known to the other party and the amount of rent or salary should be in accordance with the convention of the locality and must be just and acceptable to both parties.¹⁸⁹

b] Liabilities of Parties in Ijārah

As a general rule, once the contract of *ijārah* is concluded, as in other contracts, both party will be liable for the performance of what has been agreed. In the case of *ijārat al-‘ayn*, like in *bay‘*, the lessor (*mua’jjir*) is under obligation to shift the property with which usufruct (*manfa‘ah*) can be enjoyed and hand it over the lessee (*musta’jir*). Similarly, the lessor will also be responsible for *ḍamān al-ta‘arruḍ* (guarantee against fault in ownership) and *ḍamān al-‘ayb* (guarantee against defects). Both liabilities, on the part of the lessor, are known as *iltizām bi taḥqīq ghāyah* (liability to accomplish a pursuit). On the other hand, the lessee is responsible for a counter-action to the lessor that is paying the fee or price of the lease (*daf‘ al-ujrah*) and taking due care of the leased property (*muḥāfaẓah ‘alā ‘l-‘ayn al-mua’jarah*). This is known as *iltizām bi badhl al-‘ināyah* (liability to grant care). In the case of *ijārat al-ashkhāṣ*, the employer is liable to pay the wage when

¹⁸⁸Classical works has given a well-known example to illustrate this in the case of hiring of a runaway riding animal or usurped merchandise as they amount to *gharar*. *Gharar* is an uncertain situation as regards to the availability of the goods on which the contract is made which will be a potential cause for inability for the execution of *ijārah* and thus bring about various consequences such as dissatisfaction, request for termination of *ijārah*, claiming damages and others. See *Minhāj*.

¹⁸⁹*Badā’i‘*, vol.IV, pp.193-194.

the task is being performed or after it has been completed. The employee, in return, has to perform the specific task (*al-qiyām bi ‘amal al-mu‘ayyan*) as stipulated. He is referred to as being responsible to *tahqīq ghāyah mu‘ayyanah* (for accomplishing a specific pursuit).¹⁹⁰

If handing over of the usufruct has become impossible, the *mua’jjir* is considered to have failed to execute his responsibility and the *musta’jir* is not liable to pay the fee (*ujrah*). If the cause of the failure is a *force majeure* (*quwwah qāhira*), like damage of the leased property before handing it over, *ijārah* is terminated and the *musta’jir* is not liable to make any payment. This is simply because of the impossibility of performance of the *ijārah*.

There are instances where impossibility occurs while the lessee is in the midst of enjoying the usufruct (*athnā’ al-intifā’*), whereby the liability for *ujrah* will be renounced for the remaining period though the payment for the period prior to the impossibility is still due. The case of *ijārat al-ḥammām* (rent of washroom) is illustrated in *Badā’i’*:

"If a person hires a washroom (*ḥammām*) in a locality and a (frightening event take place) in it and he has to move from it, he is not duty bound to pay the rent. If only some people are leaving, the rent is not waived....[In the case of renting a house] if part of the house is destroyed, the Ḥanafīs upheld that the rent will be waived according to the extent of the damage. Ibn al-Shāḥnah said : based on the *zāhir al-riwāyah*, the rent is not exempted from him by the destruction of a room or a wall of the house...."¹⁹¹

The obligation for *ḍamān al-ta‘arruḍ* will also fall on the lessor together with *ḍamān al-‘ayb*. If the lessee is being deprived of the usufruct like by being

¹⁹⁰ *Naḡ. Ḍamān*, p.239.

¹⁹¹ *Badā’i’*, vol.IV, p.196.

restrained by a third party from benefiting from the *ma'jūr* (rented property), the lessor is a responsible (*dāmin*) and the lessee is exempted from liability to pay the rent. The case of *ghaṣb* of the rented property is an example of such situation.

“If the rented house has been wrongfully appropriated (*ghaṣb*) by a usurper, and the *musta'jir* is unable to remove the usurper's intervention, despite his effort to do so, he is not liable to pay the rent after the *ghaṣb*, by virtue of his inability to enjoy the usufructed property. It is treated as having a similar circumstances as the demolished house (*kharāb al-dār*)...he is only liable to pay the rent for the period prior to the *ghaṣb*.”¹⁹²

Another situation which prompted application of *damān* are when defects are proven on the rented property, which has impeded the enjoyment of benefit from it.¹⁹³ This can be in the form of impossibility or formidable difficulty in performance of the *ijārah* contract, such as is caused by the disappearance of the property or when some deficiencies have affected it.

“In a contract of hire, the circumstance which creates an option on account of defect is something which causes complete loss of or interference with the benefits sought to be obtained. Example : A house is entirely destroyed; the utility of a mill is prevented by water being cut off (*inqitā' mā' al-raḥy*); the frame of a roof of a house sinks; a place is knocked down so as to be unsuitable for habitation; the back of a horse which is hired is injured by galling. In all these cases there is an option for defect, if they are taken on hire, on account of the benefits sought to be obtained being destroyed. But defects which do not interfere with the benefits sought to be obtained give no right to an option for defect in the case of a contract of hire, as where the plaster of a house falls off, but not to such an extent that rain and cold can enter; or where the mane or tail of a horse is cut.”¹⁹⁴

¹⁹²*Badā'i'*, vol.VI, p. 196. Also see Ibn 'Ābidīn, *Radd al-Mukhtār wa al-Durr al-Mukhtār*, vol.V, p.53.

¹⁹³The defect that prevents benefit (*al-'ayb alladhī yakhillū bī 'l-intifā'*) means: “The existence of the defect has rendered the enjoyment of benefit as impossible and the intended purpose of the *ijārah* contract has been ruined.” See *Naz.Damān*, p.241.

¹⁹⁴*Maj. 'Adliyyah*, art.514. See *Civil*, Vol.I [The Mejelle], p.118.

In such circumstances, the lessor is responsible for the unforeseen defect (*‘ayb ṭāri’*) and the lessee is granted right of option, either to rescind the contract or continue with it, accepting it even with the payment of full price.

"If a defect occurs in the thing hired, the person taking the thing on hire may exercise an option. He may either put the thing hired to the use for which it was hired in spite of the defect, in which case he must pay the whole of the rent or he may cancel the contract of hire."¹⁹⁵

The lessee in the case of *ijārat al-‘ayn* is also liable for due care of the hired property. He is expected to exercise the standard care applicable (*al-‘ināyah min al-rajul al-mu‘tād*)¹⁹⁶. If he fails in that, he is considered as negligent and therefore become liable for *ḍamān*. The property is a trust in the hands of a lessee and his neglect has made him responsible for any damage to the property. It can be in form of utilizing the property in an unconventional way¹⁹⁷, in contradiction of stipulated conditions¹⁹⁸, improper use and the like, which constitute liability. Among examples cited to illustrate this situation, is using a building meant for

¹⁹⁵ *Maj. ‘Adliyyah*, art.516. See *Civil*, p.119.

¹⁹⁶ The discussion of *al-‘ināyah al-maṭlūbah* (the required standard of care) has given rise to a debate in the Ḥanafī school as to what level of care is expected out of the *ajīr*. Abu Ḥanīfah maintained that the *ajīr* is not considered as negligent if the damage to the property is caused by a third party. Abū Yūsuf and Shaybānī, however, set a stricter regime by ruling that destruction by a third party is insufficient to be a waiver for liability. They require that only in the case of *al-halāk lā yumkin al-iḥtirāz ‘anhu* (damage which beyond one's care and control) like a big fire, then only can the liability be established. See *Maṣādir*, vol.VI, p.150-151.

¹⁹⁷ It has been illustrated that any action that the *mustaʿjir* has been reminded not to carry out, he is liable if damage happens because of that action. It is not only confined to the case of *mustaʿjir* only but it is universal to other similar cases. If a *dābbah* is hired for transport and was not meant for specific person, any other person can ride it. However, if it is meant to be used by a specific person and someone else has taken a ride, is liable if a damage happens. See *Majmaʿ*, pp.13-16.

¹⁹⁸ A case whereby the *mustaʿjir* hired a *dabbāh* to carry goods which type and weight has been notified [like one saying five hundred *aqfīzah* of wheat, he is only allowed to carry what similar to wheat in terms of *qarar* or less like barley. He is not allowed to carry something with more *qarar* like salt.... See al-Baghdādī, *ibid*.

residence for manufacturing¹⁹⁹, overloading a carriage or refusal to return a hired property²⁰⁰ and the property is damaged during that interval.

c] Contract of Work

Discussion on *ijārat al-ashkhāṣ*²⁰¹ is complicated and thus calling for a more rigid interpretation of the law. In a contract of work or service, it is essential to distinguish between the two class of *ajīr* as they are undertaking different responsibilities and are answerable to a different class of people. *Ajīr Khāṣṣ* or a hired servant is a person whose services are retained by one employer only as in the case of a servant paid a monthly wage. Ibn Qudāmah defined *‘āmil khāṣṣ* as : an employee who is imposed by the *ijārah* contract to work for a definite period of time wherein the employer is entitled to derive full benefit, like a person employed to serve or work in a building, to sew or to guard, for a day or a month. He is called *ajīr khāṣṣ* because his service is exclusive for the *musta’jir* alone.²⁰²

¹⁹⁹See *Majma‘*, pp.25-26.

²⁰⁰See *Majma‘*, p.19. Also see *Maṣādir*, vol.VI., p.155.

²⁰¹It has also been called *ijārat al-dhimmah*, *ijārat al-‘amal* or *ijārat al-khidmah*. The Mālikis have distinguished the usage to the term *ijārah* from that of *kirā’* as *ijārah* is used when involving services from human being (*isti’jār al-insān*), whereas *kirā’* is used when involving rent of animals and merchandise. One of the clear example is a treatise of Ibn Abī Firās entitled *Kitāb Akriyāt al-Sufun* which has been treated in Deborah Anne Rice-Noble, *Principles of Islamic Maritime Law*, Unpublished Ph.D thesis, University of London, 1988. Al-Gharnāṭī further said: “*Ijārah* applies to cases involving buying of benefit that can think [*manfa‘ah ‘āqil*] and *ijārah* as well as *ju‘l* are applied to a *mu‘āwadah* transaction in respect of services from man [*al-mu‘āwadah fī khidmat al-ādami*]. See also Maḥmassānī’s analysis on the decisions by Qādī Shurayḥ who give a dictum that the wage paid includes liability in his *al-Mujtahidūn fī ‘l-Qaḍā’*, p.222.

²⁰²*Mughnī*, vol.VI, p.105.

The scholars of the Ḥanafī²⁰³, Mālikī²⁰⁴, Shāfi‘ī²⁰⁵ and Ḥanbalī²⁰⁶ schools of law together with Ibn Ḥazm al-Zāhirī²⁰⁷ arrived at a consensus that *ajīr khāṣṣ* holds the position of trust (*amīn*). He will not be held liable except in occasion where the damage is a result of his violation (*ta‘addī*), or neglect (*ihmāl*).²⁰⁸ As he has been entrusted to execute the task and given the required equipment, he is then permitted to act (*ma’dhūnan bi al-taṣarruf*) as a deputy (*nā‘ib*) of the employer. He will not be held responsible for any damage caused by external factors in which he has no role. However, if the damage is due to the ‘*āmil*’s negligence such as abandoning the equipment without it being maintained, being careless, reckless and irresponsible which resulted in unsuccessful execution of the work or damage to the equipment, he is liable. This is in line with the concept of justice proclaimed in the *Sharī‘ah*, as *ḍarar* must be removed²⁰⁹ and each person is responsible for his deed.²¹⁰

In contrast, *ajīr mushtarak* or self-employed artisan is a craftsman who has the right to work for more than one employer. The notion of “*mushtarak*” seems to signify that he is able to work for any member of the society who has need for his service. He is obliged by the contract of *ijārah* to carry out a certain task like making a garment or erecting a building or transporting a merchandise from one

²⁰³ *Badā‘i‘*, vol.IV, p.210; *Durar*, vol.I, pp.598, 603, 605 ; Ibn ‘Ābidīn, *Ḥāshiah Radd al-Mukhtār*, vol.VI, p.67.

²⁰⁴ Muḥammad ‘Arfaḥ al-Dusūqī, *Ḥāshiah al-Dusūqī ‘alā al-Sharḥ al-Kabīr*, vol.IV, p.26.

²⁰⁵ *Muhadhdhab*, vol.I, p.415.

²⁰⁶ *Mughnī*, vol.VI, p.106.

²⁰⁷ Ibn Ḥazm, *al-Muḥallā*, vol.VIII, p.201.

²⁰⁸ Sharaf b. ‘Alī Sharīf, *al-Ijārah al-Wāridah ‘alā ‘l-‘Amal al-Insān*, p.251.

²⁰⁹ The maxim reads : *al-ḍarar yuzāl*. See *Sh.Zarqā’*, pp.179-183.

²¹⁰ This is evident in the Qur’ānic rule which reads : [*kullu nafs bi mā kasabat rahīnah*](every individual is responsible for whatever he does). See *Q.*, al-Muddaththir: 38; al-Baqarah : 286 in which God said: [*la yukallif Allāh nafsan illā wus‘ahā*] (a person is not burdened with responsibility except what he has done). This is supported by a tradition: [*lā ḍamān ‘alā mu’taman*].

place to another in a period during which the *mustaʿjir* could not derive exclusive benefit. For instance a doctor may have to treat many patients at one time; he is rendering his service to them and they are sharing the *manfaʿah*.²¹¹ The wage of an *ajīr mushtarak* is due when the task has been accomplished whereas the wage of an *ajīr khāṣṣ* will only become due if he is ready to work during the period for which his services were hired.

ʿUmar b. al-Khaṭṭāb and ʿAlī b. Abī Ṭālib were of the opinion that the hireling, labourer and employee (*ajīr*) including a producer, a manufacturer (*ṣāniʿ*), guard (*ḥāris*), caretaker (*ḥāfiẓ*), or *rāʿī*, porter (*ḥammāl*), bleacher (*qaṣṣār*), goldsmith or jeweller (*ṣāʿigh*) were liable to replace any property which had been damaged as a result of their transgression or negligence. This standpoint is taken for safeguarding the owners' rights and interests. ʿAlī further added that the rule also applies to the washer (*ghassāl*), the dyer (*ṣabbāgh*), the tailor (*khayyāt*) and the like.²¹²

The important decision on the matter has been supported by the opinion of Ibn Rushd in his *Muqaddimāt* which is the basis of the discourse of Abū Ḥassan b. Raḥḥāl al-Maʿdanī on *taḍmīn al-ṣunnāʿ*.

“Ibn Rushd said in his *Muqaddimāt* : the original ruling is that there is no *ḍamān* on the artisan. They are in the position of trust as they are [in the same category as the] *ajirrāʾ*. The Prophet has waived *ḍamān* from *ajirrāʾ*. The scholars have severed *ṣunnāʿ* from this

²¹¹ *Mughnī*, vol.V, p.105.

²¹² Discussion on *taḍmīn al-ṣunnāʿ* which relied its authority in which it has been reported that ʿAlī b. Abī Ṭālib has been questioned by al-Shāfiʿī: Shāfiʿī said : It has been reported, in the unusual manner from ʿAlī b. Abī Ṭālib had said that a washer (*ghassāl*) , a dyer (*ṣabbāgh*) are *ḍāmin* and mankind will not attain [their prosperity] without it... It has been reported from ʿAlī b. Abī Ṭālib that he never imposed *ḍamān* on any of the workers (*ajirrāʾ*). See *Umm*, vol.VII, p.88. Also see Muḥammad Saʿīd Ramaḍān al-Būṭī, *Dawābiṭ al-Maṣlaḥah fī al-Sharʿah al-Islāmiyyah*, p.356; Muḥammad Muṣatafā Shalabī, *Taʿlīl al-Aḥkām*, p. 379.

general rule and imposed *ḍamān* on them based on the *ijtihād* and the need of people. This has been a matter of overwhelming need for protection. Mālik said that they should undertake *ḍamān* on property [lost or damaged] when they admitted being responsible for the damage.”²¹³

This standpoint, has been reinforced by Ibn Farḥūn’s *Tabṣirat al-Ḥukkām* in which he emphasized the importance of implementing a strict regime on *taḍmīn al-ṣunnāʿ* as a *Sharīʿah* oriented policy (*siyāsah sharʿiyyah*) to a government. The *ṣāniʿ* cannot simply insert an exemption clause in the contract to escape liability, and if he does that, it is legally ineffective. Similarly, the *ṣāniʿ* cannot make a defence from responsibility on the safety of the property with the excuse that his manufacturing premise has destroyed together with the property. If his manufacturing premise was destroyed by blaze, or being robbed, that cannot serve as a ground for exemption of liability.²¹⁴

Analysis on liability of *ajīr mushtarak* is not complete without including a discussion about the contract of *istiṣnāʿ* (manufacturing)²¹⁵, a rather sophisticated legal relationship compared to that of a straightforward *ijārah*. *Istiṣnāʿ* is usually treated as a contract on a material [attached to the *dhimmah* of the manufacturer] in which it is specified that the manufacturing (*ṣunʿah*) of the said material should be carried out. This is a Ḥanafī definition based on the premise that *istiṣnāʿ* is a nominate contract in its own standing. There is an alternative definition by the Shāfiʿīs, Mālikīs and Ḥanbalīs basing their analysis on the fact that *istiṣnāʿ* is

²¹³ *Taḍmīn*, pp.2-3.

²¹⁴ *Tabṣirat*, vol.II, pp.323-326.

²¹⁵ See Kāsib ‘Abd al-Karīm Badrān, *ʿAqd al-Istiṣnāʿ fī l-Fiqh al-Islāmī*, n.d.

nothing but a subsidiary of *bay' salam*²¹⁶ or *al-bay' bi al-ṣifah*. *Salam* is defined as sale of well-defined object [on the *dhimmah* of the obligee] with a counter-value of a different genus and a *ṣun'ah* is required. The *istiṣnā'* arrangement can be shown in the following quotation:

“Tailors must be ordered to cut out properly and shape the neck well, to make the ornamental border wide, the sleeves of equal length and the skirts even. Raised seams are better than tacking. The needle is to be fine and the thread contained in the eye short - a long one frays and weakens. A valuable piece of cloth must be measured before it is cut out. Valuable cloth like silk or brocade must be accepted by weight only. What is left after the garment has been made is to be returned to the owner.”²¹⁷

This example represents a typically rather simple contract of *istiṣnā'* which normally practiced in the society. The extension of the business activities of the Muslims has given rise to various new problems related to *istiṣnā'*, one of which is *al-sharṭ al-jazā'ī*. It is a term agreed upon by the parties in the event of non-performance (*ʿadam al-tanfīdh*) or delay in performance, in which compensation (*taʿwīd*) has become due. It is a foreign element alien to Islamic law, but has been absorbed within the broad term of freedom of contract and attaching conditions thereto as advocated by certain schools of law.²¹⁸ The notion of *al-ʿaqd sharīʿat al-mutaʿāqidayn* (a contract is a binding force on the contracting parties) is another

²¹⁶*Bay' salam* is also known as *bay' salaf* or *bay' mufālisah* is a sale in which advance payment is made to the vendor for deferred supply of goods. This is contrary to *bay' muʿajjal* in which payment is deferred. It was narrated by Bukharī that :“When the Prophet came to Madīnah, people used to do *salam* for two and three years”. On this, the Prophet said :“whosoever does *salam* in anything he should do so in a well-defined measurement and weight and for a fixed period”. See *Badāʾiʿ*, vol.V, p.201. Also see S.M.Hassanuzzaman, “Bay' Salam : Principles and Their Applications,” in Sheikh Ghazali Sheikh Abod et.al., *An Introduction to Islamic Finance*, Kuala Lumpur : Quill Publishers, 1992, pp.225-243.

²¹⁷*Maʿālim*, p.44.

²¹⁸Freedom of contract and freedom of making conditions were championed by the Ḥanbalī school, founded on the premise of the verse: “O you who believe, fulfill your undertaking” and the ḥadīth: “Muslims are bound by their stipulations except when they legitimize the forbidden and vice-versa”. For details see Muḥammad Yusuf Mūsā, “Freedom of Contract and Stipulations in Islamic Law,” *IC* [1955], pp.156-170.

premise on which *al-sharṭ al-jazāʾī* was founded. The nature of commercial transactions has undergone some transformations and thus there is need for legal mechanism which corresponds to the changes. In this case, the jurists have exercised their own *ijtihād*.²¹⁹

As a conclusion, it can be said that the liability in *ijārat al-ashkhāṣ* will rest on the *ajṭr mushtarak* who is in the same position as a debtor (*madīn*). An *ajṭr khāṣṣ* will be exempted from liability by virtue of the nature of his employment.²²⁰ In the case of *ajṭr mushtarak*, the liability will be determined according to the effect of the work on the property involved. If the work has a great impact on the make-up of the property like *khiyāṭah* (tailoring), *ṣibāghah* (dying) and the like, he is only entitled to payment by handing over the finished article. What has been agreed upon in the contract is that the cloth will be transformed into a garment and will be handed over to the *muʾajjir* at the end of the work. Even if the garment is ready but *taslīm* has not taken place, the tailor is liable if any damage took place while the merchandise is his possession.

Contrarily, if the work has no effect on the property like in the contract of carriage of goods, payment is due if the work is accomplished even if the property

²¹⁹*Maṣādir*, vol.I, p.21-23.

²²⁰He will be entitled to his wage upon completion of the assigned work. If the work is not completed or done half way, he will get payment to the extent of the work done. The property is then returned to the owner and he is entitled to claim for his wage. If his work is hampered by impossibility, the wage is forfeited by virtue of the event. See *Naẓ.Ḍamān*, p.168. Regarding the liability of the servant of an *ajṭr mushtarak*, the jurists hold that he is not liable. The employer is liable as the fault of the servant is the fault of the employer because the employer is the guarantor (*dāmin*) or surety (*kaṭl*) for the servant. It was argued on the basis that the principal (*matbūʿ*) asks for the work of his subordinate. There exists a contract of employment between them and the damage occurs as a result of the servant in the course of his work in the situation when general custom is being observed. See *Naẓ.Ḍamān*, pp.256-257. Rice-Noble in her analysis, confirms the existence of the doctrine of vicarious liability in Islamic law. See *Maritime*, pp.162-170.

is not handed over to the owner. In this case, payment is the remuneration for the work itself not the finished article (*athar al-ʿamal*) as in the first case. If the duration of an *ijārah* contract has ended and the work has been carried out, and finished article is ready to be collected by the owner, there will be no liability on the *ajīr* afterwards.²²¹ If the performance of contract is hampered by impossibility, the wage is charged to the employer according to the event that has happened. If a transporter died before any of his contract had been carried out, the whole payment is waived. If he died during the course of the transportation, he will be paid proportionally.²²² It is obvious that the person who will undertake the responsibility

²²¹Ibid.

²²²Ibn Nujaym, one of the writers of the *rasāʾil* [collection of fatāwa on fresh cases in which there is no textual authorities] of the Ḥanafī school, has spelt out the division of liabilities in the case of carriage of goods by sea. The full text reads : "I was asked on [the liability] a person who hires a ship [according to the *Sharīʿah* rules] to be used to transport goods (*al-ḥaml*) from Suez to Jiddah al-Maʿmūrah. He travelled with it and the ship sank during the voyage. The ship and the goods in it damaged. I was asked whether he is liable for the price of the hire or he only pay up to that time. I replied: He is liable to pay in terms of the distance that he has travelled as the *maʿqūd ʿalayh* (object of contract) was *manfaʿah* (usufruct), not an accomplishment of work such as *suknā al-dār* (benefit of abode), *istiʿjār al-dābbah li ʿl-rukūb* (hiring animal for riding) and the like. On the same issue, al-Zaylaʿī said: The *muʿajjir* is not entitled to part payment except in *suknā al-dār* and *qaṭʿ al-masāfah* (shortening the distance) as the *maʿqūd ʿalayh* in the contract is a benefit which is deliverable to the owner by the delivering of it. On the contrary, if the *maʿqūd ʿalayh* is *ʿamal* such as *khiyāṭah* (tailoring), *ḥaml* (carriage of goods) and *qaṣr* (bleaching) - the *ajīr* is not entitled to any payment at all. Payment of any fee will only take effect by completion of the work and handing it over to the owner. I mentioned that it has been cited in *Fatāwā Qāriʾ al-Hidāyah* that: If a *saftnah* (carrier) sank or was damaged without any deed of the owner, he is not liable for *ḍamān* neither is he entitled to any remuneration. I said: That is true in the case whereby a shipowner agreed to transport such goods to such a place. The *maʿqūd ʿalayh* is the obligation to transport (*ḥaml*). In the case with us now, the *maʿqūd ʿalayh* is benefit (*manfaʿah*). In *Qāriʾ al-Hidāyah* the case arose of whether the *mallāḥ* employed by the shipowner was entitled to any payment if the ship sank. It was replied that he is entitled to payment in proportion to the work done. The *mallāḥ* will be in the same position as *rabb al-saftnah* because the *maʿqūd ʿalayh* is benefit. *Al-Mallāḥ* could be an *ajīr khāṣṣ* in one occasion and *ajīr mushtarak* in another. If the *mallāḥ* is meant for *ṣāhib al-saftnah* he is *ajīr mushtarak*. If it means that he is an employee in the ship, he is thus *ajīr khāṣṣ*. It has appeared in *al-Sirāj al-Wahhāj* that *al-mallāḥ* is *ṣāhib al-saftnah* himself. In *al-Miṣbāḥ*, *al-mallāḥ* is a shipbuilder or a shipwright (*al-saffān*). In *al-Qāmūs*, *al-mallāḥ* is a salt trader, a mariner and a seafarer (*nawīl*). *Al-Nawīl* (as he sometime might be called) is both *rabb al-saftnah* and an *ajīr*. See Ibn Nujaym, "Risālat fī ʿl-Saftnah....", Ms.Or.11338.20 fols. 56a-57b, London : British Library's Oriental Collection. This *risālah* has also been published in *Rasāʾil Ibn Nujaym* [edited by al-Shaykh Khalīl al-Mīs], Beirut : Dār al-Kutub al-ʿIlmiyyah, 1980. The subject of carriage of goods by sea has also been treated in *Maritime*, 1988, in which an edition of a manuscript of lease of ships "Kitāb Akriyyat al-Sufun" of Ibn Abī Firās al-Mālikī has been done.

for damage (*tabʿat al-halāk*) is the *madīn* who is the *ajīr*. This has been a standard rule in other contracts like sale (*bayʿ*) and partnership (*sharikah*) that in such a situation, the possible way out is the rescission of the contract.²²³

3.14 Contract of Pledge (Rahn)

Rahn consists of setting aside property from which it is possible to obtain payment or satisfaction of some claim.²²⁴ This subject has been discussed in the preceding chapter in the realm of *tawthīq al-dayn* (security for debt). In this chapter, the issues to be discussed relating to *rahn* is more on the ancillary matters which have something to do with liability and restitution.

a] Liability as Regards Pledged Property.

Rahn is conceived in certain schools of law as *ḍamān* from one side and *amānah* from the other. This has been made the basis for determining the position of the pledgee (*murtahin*) as regards liability. The pledged property is a security for the creditor to the extent of the debt and what is beyond that is a trust on him. The Ḥanafīs ruled that the pledgee is a trustee (*yadd amānah*) as regards the substance of the pledged property, even though at the same time he is considered as *yadd al-istifāʿ* (possessor of the right of redemption) as regards the value of it

²²³For details see *Badāʿiʿ*, vol.IV, p.203 ; al-Zaylaʿī, *Tabyīn al-Ḥaqāʾiq*, vol.V, p.109 ; Ibn ʿĀbidīn, *Radd al-Mukhtār wa ʿl-Durr al-Mukhtār*, vol.V, p.12. See also *Naz. Ḍamān*, p.169.

²²⁴*Maj. ʿAdliyyah*, art.705.

(*māliyat al-marhūn*).²²⁵ If the pledgee refuses to return the property to the pledgor because of damage or other reasons, the pledgee can regard this as redemption of his debt and thereby his privilege for *ḍamān* is renounced. However, if the value of the property exceeds the debt, the remainder is a trust on the pledgee whereby all regulations on trust will apply. This standpoint was founded on the authority of two ḥadīths, one of which the Prophet said: “The pledge is set-off against the debt it is for”²²⁶. The other one was narrated from ‘Aṭā’ concerning a man who had pledged a horse, and it died while in the care of the pledgee. The pledgee went to see the Prophet and told him about the incident and the Prophet ruled : “You lose your right [to the debt]”.²²⁷ Based on these two ḥadīths, it is suggested that the pledgee will undertake the responsibility for any damage of the pledged property which will result in him losing his claim for the debt. However, his liability is restricted to the extent of the debt owed to him by the pledgor.

The dissenting view is backed by the Shāfi‘īs, Mālikis, Ḥanbalīs and the Shi‘ah Imāmiyah in which they held that the pledgee is in the position of a trustee and the same rules apply in the case of *wadī‘ah*. Their argument is based on a ḥadīth narrated by Abū Hurairah in which the Prophet said : “The pledged property should not be barred from the owner, he will enjoy the benefit and shoulder the responsibility”.²²⁸ This view is closer to the spirit of the pledge itself as impos-

²²⁵ *Naz. Ḍamān*, p.170; *Fiqh Islāmī*, vol.V, p.267.

²²⁶ The text in Arabic reads: [*al-rahn bi mā fih*] or [*idhā ‘ummiya ‘l-rahn fa huwā bi mā fih*]

²²⁷ This ḥadīth has been examined by Abū Dāwūd in his *Marāsil* and Ibn Abī Shaybah in his *Muṣṣnaf*. This ḥadīth is categorised as *mursal* (disconnected chain of narrators) and *ḍa‘īf* (weak). See *Naz. Ḍamān*, p.171.

²²⁸ The text reads in Arabic as : [*lā yughlaq al-rahn min ṣāhibih alladhī rahanah, lahu ghunmuh wa ‘alayh ghurmuh*] There is a legal maxim akin to this ḥadīth : [*al-kharāj bi ‘l-ḍamān*] which means : The enjoyment of a thing is the compensating factor for any liability attaching thereto. In the event of a thing being destroyed, the person to whom such a thing belongs must suffer loss and conversely he may enjoy any advantages attaching thereto. See *Maj. ‘Adliyyah*, art.85.

ing the pledgee with the liability will jeopardise his right in the whole *rahn* transaction. If the debt is waived with the destruction of the pledged property, it will contradict with the nature of *tawthīq*. The property lies in the hand of the pledgee by consent of the owner-pledgor. The consent reflects the agreement to appoint the pledgee holding the property on trust similar to the case of *wadī'ah*.²²⁹

However, despite the previous view attributed to the Mālikīs, Mālik himself is said to have further set a precaution by ruling the imposition on liability of the pledgee (*taḍmīn al-murtahin*) when a dispute arose. This is true if the pledged property is of the type which is of transitory nature and it is quite difficult to prove transgression, negligence and any other fault if any damage or theft occurs. This is the reason why the law allows both parties to arrive at an agreement to deposit the pledged property with a third party known as *al-ʿadl*²³⁰. It is an alternative method to avoid any difficulties when any unwanted incidents took place.

Some of the pledged property may be borrowed by the pledgor from someone else. The lender of property which has been given as security for a debt may not claim such property from the pledgee until the debt in respect to which it has been given as security has been repaid.²³¹ In the event of the death in the state of bankruptcy of a person who has pledged borrowed property, such borrowed property continues as a pledge in the possession of the pledgee and cannot be sold without the consent of the lender. Should the lender of the pledge seek to repay the debt by means of the sale of the pledge, such a pledge shall be sold independently

²²⁹*Naz. Ḍamān*, pp.171-172.

²³⁰He is a person to whom both the pledgor and the pledgee give their trust to hold the pledged property, taking care of it and maintaining it.

²³¹*Maj. ʿAdliyyah*, art.735

of the consent of the pledgee, provided that the value thereof is sufficient to meet the debt. If the value of the pledge is not sufficient to meet the debt, however, such pledge may not be sold without the consent of the pledgee.²³²

Another important issue which needs to be discussed is the question of the cost of maintaining the pledged property. It has been a unanimous agreement among the jurists that the owner-pledgor is responsible for the said cost by virtue of the legal maxim: “*lahū ghunmuh wa ‘alayh ghurmuh.*” If the pledgor refused to pay the maintenance and the pledgee has to use his own expenses, he can claim from the pledgor. If the cost exceeds the value of the property, it is a debt on *dhimmah* of the pledgor, regardless of whether that is carried out by consent of the pledgor or otherwise. The Shāfi‘īs ruled that the pledgor can be forced to pay the maintenance if he is available and can afford the cost. If his whereabouts are unknown, the *qāḍī* can order maintenance of the pledge from any of his property available. If he is in financially difficult circumstances, the *qāḍī* can give him a loan, sell part of the property or he can order the pledgee to maintain and the cost is a debt on the *dhimmah* of the pledgor. The pledgee can claim the cost of maintenance if it is executed by permission of the *qāḍī* or at least witnessed by him.²³³

b] Deriving Benefits From the Pledged Property

When a property has potential of yielding benefit, the benefit needs to be utilised. Otherwise, it will be a waste which is prohibited by the law. The question

²³²*Maj. ‘Adliyyah*, art.736.

²³³*M. Muḥtāj*, vol.II, p.136.

is, who is entitled to enjoy the benefit. The majority of jurists other than the Shāfi'īs held that the pledgor (*rāhin*) is prohibited from doing so. The Shāfi'īs argued that benefitting is allowed so long as that does not jeopardise the right of the pledgee. The Ḥanafīs requires that benefitting by the pledgor in use (*istikhdām*), riding (*rukūb*), wearing (*labs*), staying (*suknā*) must be permitted by the pledgee. The Ḥanbalīs held the similar opinion that permission and consent need to be sought. The Mālikīs seek a stricter line arguing that if the pledgee consented to the benefitting by the pledgor, that will disqualify the pledge, even if no actual benefit has been derived. On the contrary, the Shāfi'īs held that the pledgor can benefit from the pledge which does not diminish by its use. However, the benefit and the increment of the pledge belong to the pledgor. If the use involves reduction of the value of the property like erecting a building or cultivating the pledged land, the pledgee's consent is needed in order to safeguard his rights.²³⁴

Benefiting by the pledgee has been subject to a thorough scrutiny. The majority of jurists except the Ḥanbalīs ruled that the pledgee is not allowed to benefit from the pledge. They have construed the authorities²³⁵ allowing gaining benefit in terms of milking (*maḥlūb*) and riding (*markūb*) to the extent of the *ʿilaf* (cost of maintenance mainly feeding) as exclusively applied to the case of pledgor's refusal to pay the cost of keeping the pledge. It appears that there is no contradiction on this matter as the Ḥanbalīs themselves allowed such benefitting in a restricted manner, wherein only riding and milking to recover the feeding cost are allowed.²³⁶

²³⁴*Fiqh al-Islāmī*, vol.V, p.245.

²³⁵A report by al-Dārquṭnī and Ḥākim reads : [*al-rahn markūb wa maḥlūb*] means a pledged property can be rode and milked. Another report by al-Bukhārī reads : [*al-ḡahr yurkab bi nafaqatih idhā kānā marhūnan*] which means that : (the back of) a pledged riding animal can be ridden in return for the cost of maintenance]. See *M.Muhtāj*, vol.II, p.131.

²³⁶Ibn Rushd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*, vol.II, p.273.

The Ḥanafīs held that the pledgee is not allowed to benefit in any form except with pledgor's permission. His right inherent in the property is merely the right of retention (*ḥaqq al-ḥabs*) and not right to gain benefit. If he actually gains benefit and the property suffers loss during such practice, he is liable as his standing is treated as similar to that of a usurper (*ghāṣib*). Some Ḥanafīs held that the permission granted by the pledgor to the pledgee to benefit made such benefit legitimate. Another group of Ḥanafī scholars held that such practice is *ribā* and thus prohibited it. Mere consent could not legitimise *ribā*. Another opinion maintained that it is prohibited if benefiting has been made a condition of the contract. Otherwise, it is permitted and such allowance is considered as a good gesture of the pledgor. The last opinion, according to Ibn ʿĀbidīn is in line with the spirit of the legislation as it has been operating in that direction in the society and has been customarily accepted. Despite that, it has been suggested that precaution (*iḥtiyāt*) is vital in such matters as advocated by Islām. Any loan that derives benefit (*qarḍ jarra nafʿan*) attached to the contract as a condition (*mashrūṭan*) or as an accepted custom (*mutaʿārifan*) is *ribā*.²³⁷

The Mālikīs have come up with a similar but refined standpoint saying that benefiting by permission of the pledgor or by a condition attached by the pledgee to the contract is allowed if the debt in question involves a bilateral transaction (*muʿāwadhāt*) like sale. In this respect, the duration involved must be spelt out so as

²³⁷ *Ashbāh.N*, p.??? In the *Fatāwā Tatarkhāniyyah* the text concerning this matter reads : "If a person asks for a loan (*qarḍ*) and surrenders his donkey to the creditor for use for a period of two months until the debt is repaid or gives his house to be inhabited by him, it is treated as a voidable lease (*ijārah fāsīdah*) in which he has to pay a standard prevailing rent (*ajr mithl*). It does not by any means fall under the category of *bayʿ al-wafāʾ* which has some ground for exceptional rules, as the required characteristic of it is untenable. See *Naz.Damān*, p.257.

to avoid ignorance about the facts of the deal that might destroy *ijārah* as they are both sale and hire. What is allowed according to al-Dardīr is that the pledgee may gain benefit for himself free of charge or he will deduct it from the debt in order to gain earlier settlement of the debt. However, this is not allowed if the debt is a loan (*qard*) as it is a loan that derives benefit.²³⁸ A gift from a creditor is not allowed and has been prohibited by the Prophet in a ḥadīth : “If one gives a loan, he should not accept any present (before settlement of it).”²³⁹

The standpoint of the Shāfi‘īs on this matter is similar to that of the Mālikīs. Their argument is based on the ḥadīth : “the pledged property should not be barred from the owner, he will [continue] enjoying the benefit and shoulder the responsibility.”²⁴⁰ The term *ghunm* signifies all sort of increments whereas *ghurm* signifies damages and depreciations. Therefore, the term *ghunm* in this context shows that all types of benefiting is an exclusive privilege of the pledgor-owner. If the pledgee stipulates any clause that will jeopardized the pledgor’s right, such is not legally recognized and it violates the ḥadīth : “any stipulation which could not be found in the Book of God is void”. The contract is void because it contradicts the very essence of the transaction such as a stipulation which is detrimental to the pledgor’s interest.²⁴¹ However if the benefit is clearly indicated and spelt out, stipulating that the pledgee is allowed to benefit from the pledge, it is permitted provided that *rahn* is a condition in the sale. This is a combination of *bay‘* and *ijārah* in one transaction such as a person saying: " I sold my horse to you for a

²³⁸Al-Dardīr, *al-Sharḥ al-Kabīr*, vol.III, p.246; Ibn Rushd, *Bidāyat al-Mujtahid*, vol.II, p.273; *Qawānīn*, p.334.

²³⁹This ḥadīth is reported by Anas b. Mālik in which the Prophet said : [*Idhā aqrada falā ya’khudh hadiyyah*]. See al-Shawkānī, *Nayl al-Awṭār*, vol.V, p.231.

²⁴⁰See notes supra, p.119.

²⁴¹*Muḥadhdhab*, vol.I, p.268. Also see *Maṣādir*, vol.III, p.121; Sue Rayner, *The Theory of Contract in Islamic Law*, p.352.

hundred pounds provided that you will put your house as a pledge to me and I shall benefit from the house for a year. Some part of the horse is a sold property and some part provides the payment (*ujrah*) for the benefit derived from the house.”²⁴²

The Ḥanbalīs opined that in cases other than the one involving animals in which food is not needed to keep it, the pledgee is not allowed to benefit except by permission. Benefiting with a consideration (*‘iwāḍ*) in the case of a loan is allowed by which a standard prevailing payment (*ajr mithl*) is payable to the pledgor, otherwise it will be a prohibited loan that derives benefit. If *rahn* is given in form of price of a merchandise (*thaman mabī‘*), rent of a house (*ajr dār*) or debt which is not a loan (*dayn ghayr al-qarḍ*), the pledgor’s permission will render gaining benefit out of a pledge as lawful. One significant difference is that the Ḥanbalīs allowed benefitting from an animal if it can be ridden or milked to the extent of the cost of feeding.²⁴³ Regarding this, Ibn al-Qayyim said in his *I‘lām al-Muwaqqi‘īn* that, the conventional requirement of complete equivalence in between the two objects of such a reciprocal transaction, is disregarded as that is difficult and God will excuse it. Other schools rejected this opinion as they argued that the ḥadīth that the Ḥanbalīs are relying on has been abrogated by a ḥadīth : “You should not milk an animal which belongs to others”.²⁴⁴

c] Transactions Involving the Pledged Property

²⁴²*Umm*, vol.III, pp.146-148. Also see *M.Muḥtāj*, vol.II, p.121.

²⁴³*Mughnī*, vol.IV, p.385; al-Buhutī, *Kashshāf al-Qinā‘*, vol.III, p.342.

²⁴⁴The text reads : [*lā taḥlub māshiat imri‘in bi ghayr idhnihi*] See al-Ṣan‘ānī, *Subul al-Salām*, vol.III, p.52 in which this ḥadīth has been verified by al-Bukhārī under Abwāb al-Mazālim ‘an Ibn ‘Umar. Also see *Nazḍamān*, p.259.

Another issue is *al-taṣarruf fī 'l-rahn* (right of disposition of the pledged property). Firstly, if the disposition is executed by the pledgor-owner, there legal standing of it will depend on whether the disposition takes place before or after *taslīm* (delivery), the point where all the legal consequences of *rahn* commence. The Ḥanafīs, Shāfi'īs and Ḥanbalīs agreed that if the transaction is made before *taslīm* and without the permission of the pledgee, it carries legal effect. This argument is based on the fact that the property is not yet attached to the right and interest of the pledgee. The Mālikī's differing argument lies in the fact that according to their doctrine *rahn* will take effect by the connection of offer and acceptance. Immediately afterwards, the pledgor is obliged to surrender the property. But they still held the transaction as valid and the price of the transaction is due to replace the pledge. However, if there is any deal to be made after *taslīm*, the consent of the pledgee needs to be sought as he has an inherent right in the pledged property. The Ḥanafīs said that the sale will be treated as *mawqūf* (suspended) until the pledgee gives his consent or the debt is repaid or the pledgee has released him on the basis of *ibrā'*.²⁴⁵

On the contrary, the pledgee is not allowed to proceed with any disposition without a consent from the pledgor-owner as the property is not his. The Ḥanafīs said that the pledgee's disposition be it a sale, gift, donation, lending and the like is suspended until the pledgee has consented. Otherwise, the transaction is invalidated. If the property is damaged during the execution of *bay'* (sale), *hibah* (gift), *ṣadaqah* (donation) or *'āriyah* (lending), the pledgor has the right of option (*khiyār*) whether the pledgee is liable for *ḍamān* in which no other individual will get involved, or the liability will fall on the party involved in the said disposition

²⁴⁵*Fiqh Islāmī*, vol.V, pp.260-266.

(*al-mutaṣarraf ilayh*). In the latter situation, their knowledge about the breaking of the rules on pledge is immaterial in order to establish liability. In the case involving *ijārah* (lease), *wadī‘ah* (custody) or another *rahn* (pledge) where damage took place therein, they will resort to option. The pledgor can choose whether to claim *ḍamān* from the pledgee or from the *mutaṣarraf ilayh*. Nevertheless, in fact the liability still goes back to the pledgee as the *mutaṣarraf ilayh* is working for the pledgee in all those cases mentioned. The *mutaṣarraf ilayh* will be liable if his violation can be proven.²⁴⁶ The Mālikis shared the same line of argument as the Ḥanafīs.

Conclusion: Through this chapter, *ḍamān* is seen as the general notion of guarantee given to the contracting parties in their transactions. Its important role as inherent warranty in a contract (termed by some as *ḍamān al-‘aqd*) and the remedy if such is needed, has provided a way out of any dispute that might arise. It will regulate the commercial dealings, whereby fair trading could be achieved. Businessmen are happy with the smooth running of the trading and the consumers, on the other hand will be satisfied and get a good deal. Furthermore, its function in regulating a fiduciary relationship is significant. The interested party will be provided with an assurance that his property will be safe or at least his right in it will be protected. If any wrongdoing is inflicted against him, the law will put it right, as far as it can, by awarding the affected party with an equitable remedies.

²⁴⁶Ibn ‘Ābidīn, *al-Durr al-Mukhtār wa Radd al-Mukhtār*, vol.V, p.342 and 372.

CHAPTER FOUR

METHODS AND PROCEDURES IN THE APPLICATION OF ḌAMĀN

“The maxims of *fiqh* refer to the body of abstract rules which are derived from the detailed study of *fiqh* itself. They consist theoretical guidelines in the different areas of *fiqh* such as evidence, transactions, matrimonial laws, etc. As such, they are an integral part of *fiqh* and are totally separate from *uṣūl al-fiqh*.”

[M.Hashim Kamali, *Principles of Islamic Jurisprudence*, p.5.]

Treatment of the methods (*qawā'id*) and procedures in the application of *ḍamān* is indispensable, in order to complement the theoretical discussion dealt with earlier. In order to deal with the subject of *ḍamān*, it is necessary to understand the *qawā'id* so that there can be a proper evaluation of the rulings in order to assess the actual transgressions and infringement that have taken place in human life. Accordingly, the violation of rights of others will give rise to the issue of compensation in the form of property (*ta'wīḍ mālī*), settlement of disputes (*faṣl al-munāza'āt*), release from liabilities (*al-takhalluṣ min al-iltizāmāt*) and so on. Such matters have become standard in the courts of law where people come to seek adjudication and remedies of their problems.

Procedure (*ijrā'āt*) is the formal manner in which legal proceedings are conducted. The substantive law, the part of the law that deal with rights, duties and all other matters that are not purely of practice and procedure, need an efficient procedural principles to implement the law. Majid Khadduri notes that procedural

justice is the external aspect of the law of which substantive justice is realized. This aspect of justice, often called formal justice, is manifested in the degree of regularity, meticulousness and impartiality in the application of law.¹

4.1 Legal Maxims Associated with *Ḍamān*

One of the means by which Islamic jurisprudence has sought to indicate the methods and procedures for the application of justice has been through what are called as legal maxims (*qawā'id fiqhiyyah*). *Qā'idah* literally means foundation, essential or rudiment. This has been referred to in the Qur'ān as God said : "And when Ibrāhīm and Ismā'īl had established the foundation of the House (of God). The grammarians uses the term *qā'idah* in the sense of *al-dābiṭ* which means general rule of Arabic grammar (*naḥw*). The fuqahā' defined the term *qā'idah* as the predominant ruling which is applied to the greater part of its particular [*Hukm aghlabī yanṭabiq 'alā mu'zam juz'īyyātih*].² Muṣṭafā Zarqā' put forward a comprehensive definition of *qā'idah fiqhiyyah* as: "The root maxim of *fiqh*, dedicated in concise text with regulatory nature, containing general rules of law on the issues that transpire under its theme" [*Uṣūl fiqhiyyah kulliyah fī nuṣūṣ mūjazah dustūriyyah tataḍamman ahkāman tashrī'iyyah 'āmmah fī 'l-ḥawādith allatī tadkhul taḥta mauḍū'ihā*].³

¹Justice, p.144.

²Al-Ḥamawī, *Ghamz al-'Uyūn al-Baṣā'ir* cited in *Sh.Bāz*, vol.I, p.2.

³*Sh.Zarqā'*, pp.33-34. Also see his *Madkhal*, p.37. Al-Suyūṭī's definition reads: "a general rule which applies to its particulars". See *Ashbāh.S*, p.5; *Falsafat*, p.151.

Historically, the maxims of Islamic law were not articulated all at once. The concept and wording of the maxims have been developed gradually⁴, especially during the pinnacle development of *fiqh*, by great scholars who are qualified as *ahl al-takhrīj*⁵ and as *ahl al-tarjīh*.⁶ This process draws its sources from the general provisions of law (*nuṣūṣ tashrīʿiyyah ʿāmmah*), principles of Islamic jurisprudence (*uṣūl al-fiqh*), legal reasoning (*ʿilal al-aḥkām*) as well as from logical reasoning (*muqarrarāt ʿaqliyyah*).⁷ In terms of its actual wording (*ṣiḡḥah*), the maxim originates in some instances from the prophetic sayings or dictums regularly used by the *imāms* of the schools and their disciples. The final established maxim would gain prominence after a long process of discourse, evaluation and refinement.⁸

4.2 Analysis by Various Scholars of the Maxims

⁴It was recorded that the Caliph ʿUmar b. al-Khaṭṭāb sent a letter to Abū Mūsā al-Ashʿarī in which he commanded him saying, “know the semblances and the similitudes and collate matters to their likes [in giving judgements].” This shows that despite the statement made in the early days of Islamic caliphate, only later is the discipline of *qawāʿid fiqhiyyah* is fully developed. See Ibn Khaldun, *Muqaddimah*, p.192.

⁵A person who is qualified in deriving the *ʿillah* (legal effective cause) from a settled legal text. See *Muʿjam Lughat al-Fuqahāʾ*, p.125.

⁶A person who is qualified to examine various authorities on certain issue and able to evaluate and eventually set the order of preference among the authorities or opinions, *ibid.*, p.128.

⁷The Ḥanafīs are considered the pioneers of this genre of legal science which was later followed by other schools. Early writings on the subjects are, among others, *Taʾsīs al-Nazar* by Abū Ṭāhir al-Dābūsī, scholar of third and fourth century - from whom Abū Saʿīd al-Hurawī of the Shāfiʿī school has taken the techniques of using the maxims and *Qawāʿid al-Imām Abī ʿl-Ḥassan al-Karkhī*, a prominent Ḥanafī’s of the first generation of jurists. Later, each school has its own text on *qawāʿid fiqhiyyah* : [a] Ḥanafī : *al-Ashbāh wa ʿl-Nazāʾir* by Ibn Nujaym ; *Majāmiʿ al-Ḥaqāʾiq* by Muḥammad Abū Saʿīd al-Khādimī [with a commentary known as *Manāfiʿ al-Ḥaqāʾiq*] ; *Majallat al-Aḥkām al-ʿAdliyyah* ; *al-Farāʿid al-Bahiyyah fī ʿl-Qawāʿid wa ʿl-Fawāʿid al-Fiqhiyyah* by Shaykh Maḥmūd Ḥamzah [b] Shāfiʿī : *al-Manthūr fī Tarīḥ al-Qawāʿid al-Fiqhiyyah* by al-Zarkashī ; *al-Ashbāh wa ʿl-Nazāʾir* by both Tāj al-Dīn al-Subkī and Jalāl al-Dīn al-Suyūṭī ; *Qawāʿid al-Aḥkām fī Maṣāliḥ al-Anām* by ʿIzz al-Dīn ʿAbd al-ʿAzīz b. ʿAbd al-Salām [c] Mālikī : *Kitāb al-Furūq* by Shihāb al-Dīn Aḥmad b. Idrīs al-Qurāfi [d] Ḥanbalī : *Kitāb al-Qawāʿid fī ʿl-Fiqh al-Islāmiyy* by Abū ʿl-Faraj ʿAbd al-Raḥmān b. Rajab al-Ḥanbalī. See *Madkhal*, pp.37-44.

⁸*Madkhal*, p.36.

Applying to Ḍamān.

There are a number of Islamic legal maxims which are crucial in treating the subject of *ḍamān* or the process of *taḍmīn* occurring in various legal texts. Wahbah al-Zuhaylī has analysed the maxims as follows, according to the major issue involved, based mainly on the maxims embodied in the Majallat al-Aḥkām al-‘Adliyyah⁹ :

1] If a person perform any act personally and is implicated therein with the person who is the cause thereof, the person performing such act is responsible therefore [article 90].¹⁰

2] A person who performs an act is responsible, even though not intentionally, and is liable to make good any loss caused thereby [article 92].¹¹

3] A person who is the cause of an act being performed is not liable to make good any loss caused by such act unless he has acted intentionally [article 93].¹²

⁹The advantage to be gained from the maxims, according to the Majallah, is to facilitate the understanding of problems and principles and nothing more. Therefore, a judge may not base his judgement upon them unless they are endorsed by specific provisions in the traditions. See *Falsafat*, p.151. Cf. provisions in *Maj. Shar‘iyyah* on *ḍamān* found in the maxims from arts.1-160. These maxims are summary of Ibn Rajab’s *al-Qawā‘id*. See the introductory notes of the edition *Maj. Shar‘iyyah* by Abd al-Wahhāb Abū Sulaymān and Muḥammad Ibrāhīm Aḥmad ‘Alī, 1981, p.31.

¹⁰The maxim reads : [*idhā ijtama‘ā ‘l-mubāshir wa ‘l-mutasabbib yuḍāf al-ḥukm ilā ‘l-mubāshir*]. Cf. *Maj. Shar‘iyyah*, art.127. Direct destruction is the destruction of a thing without the intervention of any cause between the act and the result. Indirect destruction is doing something to one thing which would ordinarily lead to the destruction of something else; the destruction would then be the ordinary and patent result of the act. See Maḥmaṣṣanī, “Transaction in the Sharī‘ah,” in *Law in the Middle East* edited by Majid Khadduri and Herbert Liebesny, pp.190-191.

¹¹The maxim reads: [*al-mubāshir ḍāmīn wa in lam yata‘ammad*]

¹²The text reads: [*al-mutasabbib lā yaḍmīn illā bi ‘l-ta‘ammud*]

4] The responsibility for an act falls upon the author thereof ; it does not fall on the person ordering such act to be performed, provided that such person does not compel the commission thereof [article 89].¹³

5. Injury [must be] removed [article 20].¹⁴

6. A person's conduct with regard to his absolute right is only legitimate if he does not harm others by it.¹⁵

7. No person may deal with the property of another held in absolute ownership without such person's permission [article 96] and no person may take another person's property without some legal reason [article 97].¹⁶

8. An act endorsed by law cannot be made the subject of claim for compensation [article 91].¹⁷

9. The enjoyment of a thing is the compensating factor for any liability attaching thereto ; that is to say, in the event of a thing being destroyed, the person to whom such thing belongs must suffer the loss and conversely may enjoy any advantages attaching thereto [article 85] ; Disadvantage is an obligation accompanying enjoyment. That is to say, a person who enjoys a

¹³The maxim reads : [*Yudāf al-fi'l ilā 'l-fā'il lā 'l-āmīr mā lam yakun mujbiran*].

¹⁴The maxim reads : [*al-ḍarar yuzāl*].

¹⁵This maxim is not included in the Majallah. Its Arabic text reads : [*taṣarruf al-insān fī khālīs haqqih innamā yaṣiḥḥ idhā lam yataḍarrar bihī ghayrah*]

¹⁶The maxim reads: [*lā yajūz li aḥad an yataṣarraf fī milk ghayrih bi lā idhniḥ*] and the other one reads : [*laysā li aḥad an ya'khudh māl ghayrih bi lā sabab shar'ī*]. See *Mūjabāt*, pp.56-57.

¹⁷The maxim reads: [*al-jawāz al-shar'ī yunāfi al-ḍamān*]

thing must submit to the disadvantages attaching thereto [article 87] ; The burden is in proportion to the benefit and the benefit to the burden [article 88].¹⁸

10. Remuneration and liability to make good loss do not accompany each other [article 86].¹⁹

11. The guarantor owns the guaranteed property from the moment it is taken into possession.²⁰

12. Necessity does not invalidate the right of another [article 33].²¹

13. Something which cannot be safeguarded from destruction should not be burdened with liability.²²

14. The hand [holding possession of a property] is responsible until he returns it or indemnifies it.²³

¹⁸ Article 85 reads : [*al-kharāj bi 'l-ḍamān*] ; Article 87: [*al-ghurm bi 'l-ghunm*] ; and article 88 : [*al-ni'mah bi qadr al-niqmah wa 'l-niqmah bi qadr al-ni'mah*]. See *Sh.Zarqā'*, p.437.

¹⁹ The maxim reads: [*al-ajr wa 'l-ḍamān lā yajtami'an*]. This rule will only apply if *ajr* and *ḍamān* share the same basis and direction, whereby they cannot co-exist. For instance a person cannot be a truthful employee and a liable usurper at the same time. Similarly, *qishāṣ* and *diyat* cannot accompany each other, based on the same premise. See *Sh.Zarqā'*, p.431.

²⁰ This maxim is not part of the Majallah but considered by Wahbah al-Zuhaylī as complimentary to the previous two maxims. It has a Ḥanafī origin and has been applied therein. See *Naz.Ḍamān*, pp.219-223.

²¹ The maxim reads : [*al-iḍṭirār lā yubṭil haqq al-ghayr*]

²² It is not part of the Majallah. The text reads: [*mā lā yumkin al-iḥtirāz 'anh lā ḍamān fih*].

²³ It originates from a ḥadīth which reads: [*'ala 'l-yadd mā ukhizat ḥattā tu'addih*]. See al-Ṣan'ānī, *Subul al-Salām*, vol.III, p.67. Cf. *Maj.Shar'iyah*, art.43 on *ḍamān* in respect of properties by virtue of a contract or a possession.

15. When the original undertaking cannot be carried out the equivalent thereof is carried out [article 53].²⁴

16. There will be no liability in cases of caretaking if one has exerted his utmost.²⁵

17. The testimony of a trustee is accepted for the purpose of excluding himself from liability but not for the purpose of imposing liability on others.²⁶

18. No liability attaches in connection with offences of or damage caused by animals of their own accord [article 94].²⁷

19. A condition must be observed as far as possible [article 83].²⁸

20. An approval sanctions the action.²⁹

Muḥammad Fawzī Fayḍ Allāh in his *Nazariyyat al-Damān fī 'l-Fiqh al-ʿĀmm* has listed twelve maxims which he described as the most important *qawā'id* in treating *damān* in Islamic law. Unlike Wahbah Zuhaylī, Fawzī's list was based

²⁴The maxim reads :[*idhā ta'adhdhar al-aṣl yuṣār ilā 'l-badal*]. Cf *Maj. Shar'īyyah*, art.143.

²⁵The maxim reads :[*lā damān 'alā 'l-mubāligh fī 'l-ḥifz*]. Cf. the maxim of Muftī Maḥmūd Ḥamzah : [*lā damān 'alā 'l-sā'ī mā kānā ṣādiqan wa mutazzaliman*]. See his *al-Farā'id al-Bahiyyah fī 'l-Qawā'id wa 'l-Fawā'id al-Fiqhiyyah*, pp.136-139.

²⁶The maxim reads: [*yuqbal qawl al-amūn bī barā'at nafsih lā fī ilzām al-damān 'alā 'l-ghayr*].

²⁷The maxim reads: [*jīnāyat al-ʿujamā' jubbār*].

²⁸The maxim reads :[*yulzam murā'āt al-sharṭ bi qadr al-imkān*].

²⁹The maxim reads: [*al-ijāzah talḥaq al-af'āl*].

more on establishing the theoretical foundation of the subject. He placed the maxim on the obligation to remove injury³⁰ on top of the list as it is the bedrock of the practice of *ḍamān*. Subsequently, he mentioned the maxim on rejection of necessity as a defence from liability³¹ as well as the principal maxims like : legal endorsement is a waiver from liability³², enjoyment of a privilege is balanced with burdening of a liability³³ and the legal standing of a person holding possession of a property (*dhu ʿl-yadd*). He then referred to the maxims dealing with the disposition of the property of another³⁴ and finally with maxims on the liability of the person who performs the action (*al-mubāshir*) and the person who is the cause to the performance (*al-mutasabbib*).³⁵ Wahbah Zuḥaylī's list instead started with the maxims on the last issues on Fawzī's list, which can be viewed as his priority concerning methods of establishing liability. He came up with more maxims than Fawzī simply because he has included not only principal maxims but also the subsidiaries.

Subhi Mahmassani's list of maxims dealing with contracts and torts has been embodied in his *Falsafat al-Tashrīʿ fī ʿl-Islām* as well as his *al-Naẓariyyat al-ʿĀmmah li ʿl-Mūjibāt wa ʿl-ʿUqūd*, which was also mainly based on the Majallah.³⁶

³⁰Article 20, *supra*.

³¹Article 33, *supra*.

³²Article 91, *supra*.

³³Article 85, *supra*.

³⁴Article 96 and 97, *supra*.

³⁵*Naz. Daman ʿĀmm*, pp.213-214.

³⁶The maxims of the Majallah which have been listed by Mahmassani are articles 3 [a contract is judged by intention], article 19 [on tortious liability], article 20 [on removal of injury], article 25 [on prohibition of removing an injury by administering a similar injury], article 53 [on substitution in compensation], article 57 [on the requirement of taking possession in a gratuitous contract], article 58 [on the management of a citizen's affairs], article 59 [on the supremacy of private trusteeship], article 67 [on the value of silence], article 69 [on the value of written contract], article 70 [on the testimony of a dumb person], article 72 [on the value of a conjecture obviously tainted by error], article 82 [on stipulations], article 83 [on sustenance of a stipulation], article 84 [on a promise which is dependent on a condition is binding], article 86 [on remuneration and liability which does not accompanying each other], article 89 [on the liability of an author of the action not the person ordering it], article 90 [on the liability of the direct author], article 91 [on waiver of liability by legal permission], article 92 [on liabilities on a direct author of action], article 93 [on the waiver of an indirect author of action], article 94 [on liability in connection with injury caused

He listed thirty maxims, in numerical order as in the Majallah, which makes reference to it easier. They are similar to Zuḥaylī's list except for a few additions. Among those are, the maxim that intention in contract is paramount to that of any formal pattern³⁷, the maxim on the requirement of *qabḍ* in a gratuitous contract³⁸, the maxim on testimony of a dumb person³⁹ and others. However, Mahmassani's classification of topical groupings of the maxims is worthy of further analysis, at least to be adopted as a model in looking into a specific case like *ḍamān*.

Mahmassani begins his explanation of his list by highlighting the rule of necessity and need. Rules of law, according to him, have been so designed as to be general in nature so as to consider all situations and all individuals. This characteristic, however, in certain circumstances will bring about injury and injustice. Thus, it becomes necessary to lighten the peoples' burden by disregarding the rules. Mahmassani quoted the maxim hardship begets facility⁴⁰ which is backed by the plea of juristic preference (*istiḥsān*), or public interest (*maṣāliḥ mursalah*) or by an explicit textual authority. He cited an example by applying the maxim to a case of loan transaction in which a debtor is in financial difficulty. If the inability of the

by animals], article 95 [on invalidity of an order to deal with property of others], article 96 [on prohibition to deal with the property of another without permission], article 97 [on prohibition to take another person's property without legal cause]. See *Falsafat*, pp.206-207.

³⁷Article 3 : In contracts, effect is given to meaning and intention and not to words and forms. The maxim reads in Arabic as : [*al-ʿibrah fī ʿl-ʿuqūd li ʿl-maqāṣid wa ʿl-maʿānī la ʿl-alfāz wa ʿl-mabānī*].

³⁸Article 57 : a gratuitous favour becomes complete only by taking possession. The term delivery has been used in various occasions but does not in actual fact represent the term *qabḍ*, but instead *taslīm*. The maxim reads in Arabic : [*lā yatimm al-tabarruʿ illā bi ʿl-qabḍ*].

³⁹Article 70 : The recognized sign of a dumb person take the place of a statement by word of mouth. The maxim reads in Arabic as : [*al-ishārah al-maʿhūdah li ʿl-akhras ka ʿl-bayān bi ʿl-lisān*].

⁴⁰The maxim reads in Arabic as : [*al-mashaqqah tujlib al-taysīr*]

debtor to pay his debt is established, payment by instalment may be permitted.⁴¹ He also quoted Ibn Rajab's maxim : a person who destroys a thing to ward off an impending injury from it is not liable to pay compensation.⁴² The notion that hardship is the cause for facility has been a basis for many legal rules such as loans, transfer of debts, incapacity and others.⁴³ On this matter, 'Alī Ḥaydar commented:

"Whenever any difficulty (*ṣu'ūbah*) represses [certain performance], it became a reason for relief (*tashīl*). In other word, it is necessary to allow widening (*tawwīṭ*) [of such facility] in such a strenuous time. Indeed, the facilities afforded by the *Sharī'ah* (*al-tashīlāt al-shar'īyyah*) by allowing *qard*, *hawālah*, *hijr*, *waṣīyyah*, *salam*, *iqālat al-bay'*, *rahn*.....all are based on this maxim as the permission is for the purpose of eliminating the hardship (*mashaqqah*) and offering facility. This is known as *rukḥṣah*."⁴⁴

Al-Ghazālī maintains that all prohibited things become permissible by necessity⁴⁵ and corresponds to the maxim : "Necessity renders prohibited things permissible."⁴⁶ This rule is not absolute as there are certain limitations to it. In analysing this maxim, Subhi Mahmassani noted that permissibility is limited by

⁴¹This leniency is founded on the basis of a Qur'anic provision which reads : "And if the debtor is in straitened circumstances, then let there be postponement to the time of ease" [*wa in kāna dhū 'usrah fa naẓīratun ilā maysarah*]. See *Q.*, al-Baqarah [2] : 280.

⁴²*Qawā'id*, p.36. Cf. *Maj. Shar'īyyah*, art.26

⁴³*Falsafat*, p.154. See article 673 [on transfer of debt], article 941 [on legal impediments], article 32 [on level of need which become a necessity], article 118 [on *bay' al-wafā'*], article 957 [on the category of people prohibited from managing their property], article 964 [on impediment on a person who might harm the public], article 1523 [on the notice for dismissal of an agent].

⁴⁴*Rukḥṣah* literally means widening, relief, easiness etc. Technically, it means the rules (*aḥkām*) are decided on the basis of the inability to perform by virtue of a prohibiting injunction (*al-i'dhār ma'a qiyām al-dalīl al-muḥarram*) as a facility for the hardship. This can be treated as an exceptional situation whereby there is a departure from the original rule (known in *uṣūl al-fiqh* as *'azīmah*). For instance permission has been granted by law on practices like *bay' al-salam* (sale for future delivery), *bay' al-mu'āṭāh* (sale by mere gesture, without the conventional pronouncement of *ījāb* and *qabūl*), *hawālat al-dayn* (transfer of debt) and so on. See *Durar*, vol.I, pp.30-31. Kamali termed *rukḥṣah* concession and *'azīmah* strict rule. See his *Principles of Islamic Jurisprudence*, pp.167.

⁴⁵*Wajīz*, vol.II, p.216.

⁴⁶*Maj. 'Adliyyah*, Art.21 reads : [*al-ḍarūrāt tubīḥ al-maḥẓūrāt*]. See *Durar*, vol.I, p.31.

textual authority (*naṣṣ*), by the extent of the necessity and by the time of the necessity. As far as limitation by text is concerned, he quoted Ibn Nujaym's saying that, "Hardship may be pleaded only when no text exists".⁴⁷ On limitation by extent, he referred to the maxim "Necessity is estimated by the extent thereof"⁴⁸ as well as the maxim "Injury is removed as far as possible"⁴⁹. He concluded by saying that necessity is an exceptional circumstance and as such should be given a narrow and restricted interpretation. Thus any authorization that may be deemed necessary should not be absolute but should be to the extent required for meeting the hardship. Limitation by time is viewed on the basis that licence by necessity or the exceptional rules, remains valid so long as the excuse or the cause of the urgency exists. If this exceptional circumstance ceases, the licence also ceases and there would be a return to the original principle.⁵⁰

Another issue discussed in this context is whether or not allowance be given to necessity when it conflicts with some other necessity. The Majallah ruled that "the lesser of the two evils is preferred".⁵¹ This maxim has been the fountain of many other supplementary maxims such as warding off public injury⁵² which are exemplified in the prohibition of an incompetent physician (*al-ṭabīb al-jāhil*) from

⁴⁷ *Ashbāh. N*, p.33. This is the view of Abū Ḥanīfah and Muḥammad al-Shaybānī. Abū Yūsuf, disagreed and based on his opinion on *istiḥsān* (juristic preference). He opined that the text should be discarded in favour of the custom (*ʿurf*). The strength of a textual authority, nevertheless, has not been affected by such view and remains superior to that of *ʿurf* as a secondary source of Islamic Law.

⁴⁸ *Maj. ʿAdliyyah*, art.22 reads : [*al-ḍarūrah tuqaddar bi qadarihā*] or [*mā ubīḥa li ʿl-ḍarūrah yataqaddar bi qadarihā*].

⁴⁹ Article 31, *supra*.

⁵⁰ *Maj. ʿAdliyyah*, art.23 provides : "Whatever is permissible owing to some excuse ceases to be permissible with the disappearance of that excuse" [*mā jāzā li ʿudhr baṭala bi zawālih*]

⁵¹ Article 29 which reads : [*yukhtār ahwan al-sharrayn*]. According to ʿAlī Ḥaydar this article is akin to that of article 28 which reads : [*idhā taʿaraḍa maḥṣadatān rūʿiyā aḥṣamuhumā ḍararan bi irtikāb akhaffihimā*]. See *Durar*, vol.I, p.37.

⁵² *Maj. ʿAdliyyah*, art.26 reads : A private injury is tolerated in order to ward off a public injury [*yataḥammal al-ḍarar al-khāṣṣ li dafʿ al-ḍarar al-ʿamm*].

practise and the prohibition of an insolvent artisan (*al-makārī al-muflis*) in order to protect the general public from any harmful consequences to their well-being. Subhi Mahmassani further highlighted the issues like price control (*tasʿīr*)⁵³ of commodities by the government in situations of monopoly, forcing a monopolist to sell his stocks of food in cases of need and the like.⁵⁴ Warding off evil is another corollary principle. If there be a conflict between warding off an evil and securing benefit, the former is given preference over the latter.⁵⁵ The Ḥanafī school built upon this principle the theory of the abuse of right (*naẓariyat al-taʿassuf fī istiʿmāl al-ḥaqq*). It provided that a person may be denied the exercise of his right if such exercise should result in “excessive injury” to others.⁵⁶

4.3 Intention in Actions

In applying *ḍamān*, it is necessary to determine a person’s action in order to establish liability. Every action of a human being must stem from his will that is his choice of such action. This act of will is termed intention (*niyyah*). In Islamic law an act is judged in light on the intention or the purpose it seeks to carry out. A ḥadīth of the Prophet reads : “Deeds are judged by intentions and every person is judged according to his intentions”.⁵⁷ Thus an act has been linked to intentions as

⁵³For details on price regulation, see Abdul Azim Islahi, *Economic Concept of Ibn Taimiyah*, 1988, pp.93-102. This subject will be discussed in further detail in the forthcoming chapter on the role of *hisbah* in application of *ḍamān*.

⁵⁴Al-Shātībī, *al-Muwāfaqāt*, vol.II, p.350 ; Ibn Qayyim, *al-Ṭuruq al-Ḥukmiyyah*, p.223 and 233.

⁵⁵*Maj. ʿAdliyyah*, art.30 reads : Repelling an evil is preferable to securing a benefit [*darʾ al-mafāsīd awlā min jalb al-maṣāliḥ*]. See *Ashbāh.S*, p.62; *Ashbāh.N*, p.36.

⁵⁶Details on the theory of the abuse of right can be found in an excellent work of Fathī al-Darīnī, *Naẓariyat al-Taʿassuf fī Istiʿmāl al-Ḥaqq fī ʿl-Fiqh al-Islāmī*, 1968. See also *Mujabāt*, vol.I, p.45.

⁵⁷Badr al-Dīn al-ʿAynī, *ʿUmdat al-Qārī* li *Sharḥ al-Bukhārī*, p.34. The ḥadīth reads : [*inama ʿl-aʿmāl bi ʿl-niyyāt wa innama li kulli imriʾin mā nawā*]

may be discerned in the maxim : “Matters are determined according to intention”.⁵⁸ That is to say, the effect to be given to any particular transaction must be in accordance with the intent underlying that transaction.⁵⁹

Among other corollary maxims is : “In contracts effect is given to intention and meaning and not words and forms”.⁶⁰ This means that in the event of a difference between intention and outward expression, the judgement should be in accord with the intention to the extent that it may be ascertained as consideration should be given to the meaning and not to literal wording.⁶¹ For instance, it is known that a contract for the use of a thing is called *ijārah* (hire) if a remuneration is stipulated as a consideration of such a use and it is called *qarḍ* (loan) if no such remuneration is stipulated. If two persons conclude a contract apparently of a loan but in consideration for which a specific rental is provided for, the contract would be regarded as a contract of hire as its real meaning indicates and not a contract of loan as the wording of the contract would suggest.⁶²

This rule applies if no third party’s right is dependent upon the outward expression. If such rights be involved, effect should be given to the outward meaning with a view to safeguarding the people from injustice. Nevertheless, an intention should be known if it is to be effected. Thus if a divergence exist between the intention and the outward connotation and there is difficulty in ascertaining the

⁵⁸*Maj. ‘Adliyyah*, art.2 which reads : [*al-umūr bi maqāṣidihā*]. See *Sh.Bāz*, vol.I, pp.17-19.

⁵⁹*Falsafat*, p.160.

⁶⁰*Maj. ‘Adliyyah*, art.3 reads : [*al-‘ibrah fī ‘l-‘uqūd li ‘l-maqāṣid wa ‘l-ma‘ānī la ‘l-alfāz wa ‘l-mabānī*]. See *Sh.Bāz*, vol.I, pp.19-20.

⁶¹*Falsafat*, p.160.

⁶²*Majabāt*, vol.II, p.28-31.

intention, effect should be given to the outward connotation.⁶³ The Majallah says : "In obscure matters the proof of a thing stands in the place of such a thing". This is to say, obscure matters in which it is difficult to discover the truth are judged according to the obvious proof concerning their outward connotation.⁶⁴ Above all, knowledge of intention is important because it determines the correct juridical rule and failure to apprehend it makes it necessary to have recourse to outward meaning.

This principal maxim on intention has also served as a basic guideline for interpretation of legal rules in Islām. For instance, the Majallah provides that: "In principle, words should be construed according to their real meaning"⁶⁵ However, in certain situation the metaphorical meaning is upheld by virtue of the maxim: "When real meaning cannot be applied, the metaphorical sense may be used".⁶⁶ Abū Ḥanīfah said that effect should be given to the real not the metaphorical. His two disciples, Abū Yusuf and al-Shaybanī, al-Ghazālī and other jurists held that preference should be given to the metaphorical and the customary if they have become generally accepted and predominant. Hence, the Majallah ruled that "the real meaning is to be disregarded in favour of that established by custom".⁶⁷ There are a few other maxims which are essential for interpretation of legal rules like :

⁶³This is supported by a ḥadīth : "We give judgement on the basis of the apparent [evidences], God takes care the inward intention" [*ḥakamna bi 'l-ẓawāhir wa Allāh yatawallā al-sarā'ir*]. See al-Āmidī, *al-Ihkām fī Uṣūl al-Aḥkām*, vol.III, p.91 ; *Muhaddhab*, vol.II, p.86.

⁶⁴*Maj. 'Adliyyah*, art.68 which reads : [*dalīl al-shay' fī 'l-umūr al-bāṭinah yaqūm maqāmuh*]. For discussion on certain cases involving *ḍamān* see *Sh.Zarqā'*, pp.49-53.

⁶⁵*Maj. 'Adliyyah*, art.12 which reads : [*al-aṣl fī 'l-kalām al-ḥaqīqah*].

⁶⁶*Maj. 'Adliyyah*, art.61 which reads : [*idhā ta'adhdharat al-ḥaqīqah yuṣār ilā 'l-majāz*].

⁶⁷*Maj. 'Adliyyah*, art.40 which reads : [*al-ḥaqīqah tutrak bi dalālat al-'ādah*].

[a] Article 13 : “No attention shall be paid to inference in the face of an explicit statement”.⁶⁸

[b] Article 67 : “No statement is imputed to a man who keeps silence , but silence is tantamount to a statement where there is a necessity for speech”.⁶⁹

[c] Article 64 : “The absolute is construed in its absolute sense, provided that there is no proof of a restricted meaning either in the explicit text or by implication”.⁷⁰

[d] Article 66 : “A question is considered to have been repeated in the answer”.⁷¹

[e] Article 65 : “A description with reference to a thing present is of no consequence but the contrary is the case if such a thing is not present”.⁷²

⁶⁸The maxim reads : [*lā ʿibrata li ʿl-dalālah fī muqābalat al-taṣrīḥ*].

⁶⁹The maxim reads : [*lā yunsabu ilā sākit qawl lākin al-sukūt fī maʿrad al-ḥājah bayān*]

⁷⁰The maxim reads : [*al-muṭlaq yajrī ʿalā iṭlāqih idhā lam yaqum dalīl al-taqyīd naṣṣan aw dalālatan*]

⁷¹The maxim reads : [*al-suʿāl muʿād fī ʿl-jawāb*].

⁷²The maxim reads : [*al-waṣf fī ʿl-ḥādir laghw wa fī ʿl-ghāʾib muʿtabar*]. In cases where the object of sale is present and its characteristics are apparent, there is no need for elucidation. If the description is erroneous, it has no effect. But if the object of sale is not present, its characteristic is presumed to be unknown and therefore requires exposition. *Maj. ʿAdliyyah* art.310 provides : “If the vendor sells property supposedly of desirable quality and such property is devoid of a such quality, the purchaser has the option of either cancelling the sale or of accepting the thing sold for the whole of the fixed price. This is called option for misrepresentation. See *Falsafat*, pp.166-167.

[f] Article 63 : “A reference to part of an indivisible thing is regarded as a reference to the whole”.⁷³

4.4 Methods to Establish Liability.

Evidence and proof is of supreme importance in the administration of justice and so to serve as restrainer to false, weak and unsubstantiated claims.⁷⁴ The ḥadīth of the Prophet says : “If people’s claims were accepted on their face value, some persons would claim other people’s blood and properties but the oath falls on the defendant.”⁷⁵ By virtue of this general rule, a claim though genuine, is of no consequence if the claimant is unable to produce a proof. Only substantiated claims are upheld even though they are based upon some secretly forged but apparently sound proof. Regarding this matter, the Prophet gives a resolute warning:

“You come to me for adjudication. Perhaps some of you have astute arguments compared to others. Should I adjudicate in favour of a litigant against his brother upon the former’s statements while the latter in reality is in the right, then I would only be handing the former a piece of hellfire. Let him not take it.”⁷⁶

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⁷³The maxim reads : [*dhikr ba‘d mā lā yatajazza’ ka dhikr kulluh*].

⁷⁴*Falsafat*, p.168. On methods of establishing liability according to classical Islamic law see Khadijah Jaafar, *al-Bayyināt al-Muthbitah li ‘l-Ḥuqūq*, Unpublished M.A. thesis, University of al-Azhar, Cairo, 1988.

⁷⁵See Muslim, *Ṣaḥīḥ Muslim*, vol.V, p.128.

⁷⁶This ḥadīth is narrated by Bukhārī. See al-‘Ayni, *‘Umdat al-Qāri’*, vol.XIII, p.257. In light of the ordinary mechanism of administration of justice in Islām, a person found guilty of having, of his own accord, given evidence concerning a fact of which he is ignorant, even if his evidence was indeed the truth, must be sentenced to the correctional punishment laid down by the law. See *Mukhtaṣar*, p.280.

In litigation⁷⁷ be it judicial or otherwise, there are at least two parties, the plaintiff (*muddaʿī*) and defendant (*muddaʿā ʿalayh*). There is a link between the notion of evidence and definition of plaintiff under the *Sharīʿah*. Samīr Saleh suggested that a plaintiff is not merely the litigant who initiates judicial or arbitration proceedings. According to him, a plaintiff is the litigant who, by lodging a claim before a *qāḍī* or an arbitrator, as the case may be, disrupts an apparently normal state of affairs by alleging that this state of affairs does not conform with his rights. A classical example cited in textbook of Islamic law is that pertaining to an individual who claims that he is the rightful owner of a moveable property in the possession of another. The defendant is the party who admits or denies the plaintiff's claim.⁷⁸

There is no doubt that the burden of proof lies with the plaintiff. This is explained by the fact that what is apparent is presumed to be the original state and any one who makes a claim to the contrary must prove such a claim. The function of such evidence, according to the Majallah is : "The object of evidence is to prove what is contrary to apparent fact whereas the object of the oath is to assure the continuance of the original state".⁷⁹ There is another maxim on the matter : "The burden of proof is on him who alleges ; the oath on him who denies".⁸⁰ The justification for placing the burden of proof on the plaintiff rests on two grounds; firstly,

⁷⁷See *Maj. ʿAdliyyah*, art.1613; Emile Tyan, "Daʿwā," *El*(2), vol.II, pp.171-172. See *Muʿīn*, p.54 and 151-155.

⁷⁸*Arbitration*, pp.59-60. Also see *Falsafat*, pp. 169-170. For definitions of plaintiff and defendant in the classical work of Islamic law see al-Marghinānī, *al-Hidāyah*, vol.III, p.142. For modern work see ʿAlī Qurāʿah, *Kitāb al-Uṣūl al-Qadāʿiyyah fī ʿl-Murāfaʿāt al-Sharʿiyyah*, 1925.

⁷⁹*Maj. ʿAdliyyah*, art.77 which reads : [*al-bayyinah li ithbāt khilāf al-zāhir wa ʿl-yamīn li ibqāʾ al-aṣl*]. See *Sh.Bāz*, vol.I, p.51.

⁸⁰*Maj. ʿAdliyyah*, art.76: [*al-bayyinah ʿala ʿl-muddaʿī wa ʿl-yamīn ʿala man ankara*].

the existing situation presumed to be the original and normal state of affairs and it is up to the plaintiff to establish the contrary; secondly, a person summoned before the *qāḍī* or the arbitrator is presumed to be free from liability.⁸¹

Therefore, if someone claims something from another party, it is his duty to prove it because a defendant is presumed to be free from liability. The Majallah provides : “Freedom from liability is a fundamental principle”.⁸² This was one of the principle upon which the Shāfi‘ī jurists based their theory of *istiṣhāb* (presumption of continuity)⁸³ and upon which a similar maxim is formed that : “it is a fundamental principle that a thing shall remain as it was originally.”⁸⁴ Accordingly, “judgement shall be given in respect to any matter which has been proved at any particular time, unless the contrary is proven.”⁸⁵ The principle of freedom from liability necessitates the rejection of an unsubstantiated claim and requires a return to the original state.

In establishing *ḍamān*, there are two maxims which relate to the question of presuming the existence of the original attributes. The first maxim reads : “Things

⁸¹ *Arbitration*, p.60. For detailed treatment see *Minhāj*, p.506.

⁸² Article 8 : [*al-aṣl barā’at al-dhimmah*]. See *Sh.Zarqā’*, p.114.

⁸³ Literally *istiṣhāb* means escorting and companionship. Technically, it denotes that facts or rules of law and reason, whose existence or non-existence had been proven in the past are presumed to remain so for lack of evidence to establish any change. In other words, *istiṣhāb* presumes continuance of both the positive and negative until the contrary is established by evidence. In the positive sense, *istiṣhāb* requires that once a contract of sale is concluded, it is presumed to remain in force until there is a change. Thus, the ownership of a purchaser is presumed to continue until transfer of ownership can be established. A mere possibility that the property in question might have been sold is not enough to rebut the presumption of *istiṣhāb*. However, if the law only validates a contract on a temporary basis, such as lease and hire, then *istiṣhāb* cannot presume its continuity on a permanent basis. The contract will continue to operate within the specified period and terminate when the period expires. See Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence*, pp.377-378. Details can be found in *I’lām*, vol.I, p.294.

⁸⁴ Article 5 : [*al-aṣl baqā’ ma kāna ‘ala mā kāna*]

⁸⁵ Article 10 : [*mā thabata bi zamān yuḥkamu bi baqā’ih mā lam yaqum al-dalīl ‘ala khilāfih*]

which have been in existence from time immemorial shall be left as they were,”⁸⁶ and the second reads : “Injury cannot exist from time immemorial,”⁸⁷ There are two kinds of attributes, namely original and intervening.⁸⁸ Consequently, the Majallah provides : “Non-existence is a fundamental presumption attached to intervening attributes. For example, in the case of a partnership of capital and labour, if a dispute arises as to whether or not profit has been made, the statement of the person supplying labour is heard and the owner of the capital must prove that profit has in fact been made”.⁸⁹

The principle of burden of proof on the claimant has an exception which reads : “A trustee [person to whom a property has been entrusted for safekeeping] making a statement upon oath is worthy of credit”.⁹⁰ Thus, if a person who has entrusted his property to another party for safekeeping brings an action against that person, who in turn alleges that he has returned the property entrusted to him, the trustee shall be believed if he swears that he has discharged his obligation. This provision is contrary to the general rule because the trustee is a making a claim contrary to the apparent fact and by analogy should be asked to prove his claim that he has returned his trust.⁹¹

⁸⁶Maj. ‘Adliyyah, art.6 : [*al-qadīm yutrak ‘ala qidamih*]

⁸⁷Maj. ‘Adliyyah, art.7 : [*al-darar lā yakunu qadīman*]

⁸⁸The original are those which existed with the object initially like presuming that a person who has reached the age of majority is of sound mind because the attribute of sanity is fundamental with majority and exists with it initially. The intervening or transitory attribute does not exist initially with the object described. Madness and drunkenness, for instance, are qualities not presumed to exist originally and a person who claims their existence must prove his contention. See *Falsafat*, p.171.

⁸⁹Maj. ‘Adliyyah, art.9 : [*al-aṣl fī al-ṣifāt al-‘arīḍah al-‘adam - fa idhā ikhtalafa sharīkā ‘l-muḍārabah fī ḥuṣūl ‘l-ribḥ wa ‘adamih fa ‘l-qawl li ‘l-muḍārib wa ‘l-bayyinah ‘ala rabb al-māl li ithbāt al-ribḥ*]

⁹⁰Maj. ‘Adliyyah, art.1774 : [*al-amn yaṣḍuq bi yamīnih fī barā’at dhimmatih*]

⁹¹*Falsafat*, p.171.

Claims for *damān*, be it in the sense of *kafālah* or *gharāmah* will take the form of any claim relating to property (*daʿwā ʿl-māl*) that is by admission (*iqrār*), oral testimony (*bayyinah wa shahādah*) and oath (*yamīn*).⁹² Before elucidating each of the classical forms of evidence as stated, together with other rules like presumptions and documentary evidence, it is important to see the procedure involving financial matters in Islamic law. The process begins with a claim (*daʿwā; ṭalab*) in which a plaintiff lodges a claim stating who the defendant is and the definite subject and amount of the claim. The claim may be in written or verbal form. It must be made in *majlis al-qāḍāʾ* and in the presence of the adversary (*khaṣm*).

Subsequently, in the second stage, the *qāḍī* will invite the defendant who is obliged to appear to answer the plaintiff's claim. If the defendant admits the claim, the *qāḍī* should adjudicate in favour of the plaintiff. On the other hand, if he denies the claim (*nukūl*), the *qāḍī* will have to invite the plaintiff to adduce evidence (*bayyinah*) which will be mainly oral testimony. The dispute should then be decided promptly and upon satisfactory evidence. However, if the plaintiff fails to adduce the testimonial evidence required by the *Sharīʿah*, he may administer the oath (*yamīn*) to the defendant. If the defendant swears that the claim is groundless, the plaintiff's claim will be dismissed. If the defendant refuses to take an oath, the case will be decided in favour of the plaintiff.⁹³

b] Admission

⁹² *Mutlifāt*, p.297.

⁹³ *Arbitration*, pp.60-61. For details see *Muʿīn*, p.54; *Tabṣirat*, vol.I, p.133; *Muhadhdhab*, vol.II, p.310; *Mughnī*, vol.IX, p.84; Muḥammad Rākān Ḍayf Allāh al-Daghmī, *Daʿwā al-Tanāquḍ wa ʿl-Dafʿ ft al-Sharīʿah al-Islāmiyyah*, pp.39-52. Cf. Ibn Nujaym, *Rasāʾil Ibn Nujaym*, p.307.

Admission of the defendant of a claim for *ḍamān* is the strongest proof to establish the plaintiff's claim. The Qur'ān ruled that : "O ye who believe ! Be ye staunch in justice, witness for God even though it be against yourself."⁹⁴ It is further affirmed by the ḥadīth : "Speak truth even though it be against yourself".⁹⁵ This principle has been embodied in the Majallah which reads: "A person is bound by his admission".⁹⁶ It is a prerequisite for a valid admission that the person making it should be of sound mind, free from duress (*ikrāh*) and interdiction (*ḥajr*) and should have attained the legal age of majority. Hence, admissions made by minors, lunatics or other interdicted persons and those under duress are not valid.⁹⁷

The valid admission of a plaintiff's claim by the defendant is a recognised form of evidence capable of leading to a judgement in the plaintiff's favour. Once admission is made, no retraction is possible in civil and commercial matters.⁹⁸ The Ḥanafī and Mālikī schools permit a qualified admission such as a defendant acknowledging a debt but maintains that the debt has been settled. By doing so, he will be bound by his admission but will be able to adduce evidence to show that the debt has been settled. This view is unacceptable among the Shāfi'īs and Ḥanbalīs.⁹⁹

c] Oral Testimony

⁹⁴Q., al-Mā'idah [4] : 135.

⁹⁵al-Suyūṭī, *Jāmi' al-Ṣaghīr*, No.5004.

⁹⁶Maj. 'Adliyyah, art.79.

⁹⁷Falsafat, pp.173-174.

⁹⁸This is not the case in criminal cases, especially those involving *ḥudūd* or questions relating to *ḥaqq Allāh* (rights of God with right of the public), in which retraction is allowed. This is in conformity with the ḥadīth : "Set aside [the implementation of] *ḥudūd* punishment where there is a doubt" (*Idra' al-ḥudūd bi al-shubhāt*).

⁹⁹Arbitration, pp.61-62.

The second method of establishing liability is oral testimony. *Bayyinah* in the linguistic sense means the “evident” and “obvious”. In law, it has been used to connote “strong proof”¹⁰⁰ because it makes the truth evident and obvious. In the Islamic legal system, the concept of testimony is usually referring to the testimony of witnesses. Throughout the legal history of mankind, laws have been very stringent in accepting testimony to the extent that some legal systems have excluded such testimony in civil matters. In Islamic law, however, the majority of jurists have sanctioned testimony in all areas of law but have determined a strict regime on witnesses. A witness must have attained the age of majority, not be subject to any incapacity, a Muslim and of upright and trustworthy character.¹⁰¹ Furthermore, it is required prior to the giving of evidence that the witness should be absolutely impartial¹⁰² and any potential cause for impartiality will be a reason for inadmissibility of the testimony.

“In addition to qualitative requirements of witnesses, the *Sharī‘ah* prescribes certain circumstances in which a witness will be disqualified from testifying. Ancestors, descendants and spouses may not testify in favour of each other. A husband or wife may not testify in favour of each other’s children by another marriage. Testimony based on enmity or intended to procure an advantage or avoid damage is also forbidden”.¹⁰³

¹⁰⁰*Maj.‘Adliyyah*, art.1676 reads: “Evidence consists of adduction of reliable testimony” [*al-bayyinah hiyā al-ḥujjah al-qawiyyah*]

¹⁰¹*Maj.‘Adliyyah*, art.1705 of the Majallah : “A witness must be an upright person [*‘adl*]. An upright person is one whose good qualities are greater than his bad qualities. Consequently, the evidence of persons who habitually in a manner inconsistent with honour and dignity, such as dancers and comedians and persons who are known to be liars, is admissible”. This criterion is so required as the evidence given is information [*khavar*] which can be true or false. What is accepted as a proof is the true information [*al-khavar al-ṣidq*] and only the criterion of *‘adālah* ratifies the truth. See *Sh.Bāz*, vol.II, p.1039.

¹⁰²*Maj.‘Adliyyah*, art.1700 : It is a condition required before giving evidence that the witness should be entirely impartial [*yaṣhtariḡ an lā yakūn fī ‘l-shahādah daḡḡ mughrām aw jarr mughnam ya‘nī an lā takūn dā‘iyyah li daḡḡ al-maḡdarrah aw jalb al-manfa‘ah*]. See *Sh.Bāz*, vol.II, p.1023.

¹⁰³*Arbitration*, p.62.

There is a special quantitative aspect in the *Shart'ah* with regards to testimony. In financial disputes, the rule is that the testimony of two trustworthy male witnesses is required. However, the combination of the testimony of one man and two women is permitted. The Qur'ān provides : "And call to witness from among your men two witnesses. And if two men be not at hand then a man and two women".¹⁰⁴ The testimony of one man combined with the oath of the plaintiff is accepted in all school except the Ḥanafīs. In such circumstances, according to Samir Saleh, the *qāḍī* is in a position and in strict law under obligation to assess the quality of witnesses.¹⁰⁵ Practically, it is through the challenging of the integrity of the plaintiff's witnesses that the defendant is in a position to refute a claim rather than by the technique of cross-examination or the submissions of his own witnesses.¹⁰⁶ Al-Khaṣṣāf, according to Farhat Ziadeh, has even dealt with such possibility in his *Adab al-Qāḍī*. If the defendant has contested the integrity of the witnesses already cleared by the *qāḍī*, the *qāḍī* is to repeat the scrutiny of the witnesses by asking some other trustworthy people about them. If these latter should

¹⁰⁴Q., al-Baqarah [2] : 282. For details on the category of testimony see *Falsafat*, pp. 177-178. *Maj. 'Adliyyah*, art. 1685 provides : In civil cases, evidence can only be valid when given by two males or one male and two females : but in places where males are not possessed of the necessary informations, the evidence of females alone will be accepted in respect of property.

¹⁰⁵*Arbitration*, p. 62. Al-Jaṣṣās [d.980] in his commentary of *Adab al-Qāḍī* of al-Khaṣṣāf [d.874], while discussing the question of '*adālah* [integrity] especially Abū Ḥanīfah's contention that all Muslims are considered persons of integrity, has quoted the ḥadīth : "The best people are those of the generation in which I was sent [as a prophet]." Then he says : " As you can observed today, most people are not characterised by integrity. Thus there is no way out of investigating the character of witnesses in all testimonies." This theory of gradual degeneration, coupled with the importance of *shahādah* in Islamic legal practice, give rise not only to the institution of the vindication of witnesses (*tazkiyyat al-shāhid*), similar to security clearance nowadays, but also to the institution of witnesses being vindicated beforehand or by notaries. See Farhat Ziadeh, "Integrity [*adālah*] in Classical Islamic Law," in *Islamic Law and Jurisprudence* edited by Nicholas Heer, Seattle, 1991, pp.79-81. In this article, the author has strongly emphasized that the meticulousness in the procedure of the *qāḍī*'s court contrasts sharply with the wrong perception of laxity and informality of such procedure that became prevalent in the West. He criticised a remark passed by Mr. Justice Frankfurter in his dissent in the case of *Terminiello v. Chicago* [337 U.S. 1, 1949] : "This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency".

¹⁰⁶*Arbitration*, p.63.

mention any factor that would nullify the witnesses' integrity, the *qāḍī* would do so, and would not give weight to their testimony.¹⁰⁷

It is also crucial to note that, one of the fundamental conditions before any action in civil cases like *ḍamān* is the actual institution of the action.¹⁰⁸ The evidence given is admissible if it is relevant to the point at issue in the action, if it corresponds with the nature of the claim, not merely as regards to the language but also in the facts and substance, that would be accepted.¹⁰⁹ Two cases are cited as illustration:

"[1] The action concerns a property deposited for safekeeping (*wadī'ah*) and witnesses testify that the defendant has admitted the deposit or the action concerns wrongful appropriation (*ghaṣb*) of property and witnesses give testify that the defendant has admitted the action, their testimonies are admissible.

[2] A debtor maintains in the court that he has paid his debt. Witnesses give evidence that the creditor released the debtor from payment (*ibrā'*). This evidence is admissible."¹¹⁰

It was further elucidated in the Majallah that evidence must conform with the claim, whether such evidence refers to the whole or part of such claim. For instance, if the plaintiff claims one thousand piastres and witnesses only testified for up to five hundred, their evidence as regard to the five hundred is valid.¹¹¹

¹⁰⁷ Al-Khaṣṣāf, *Adab al-Qāḍī*, p.301 quoted in Farhat Ziadeh, op.cit., p.80.

¹⁰⁸ Maj. 'Adliyyah, art.1696 which reads : [*yashtariṭ sabq al-da'wā fī al-shahādah bi ḥuqūq al-nās*]. This action or claim [*muṭālabah*] can be moved by the rightful person or his representative. Unlike cases involving *ḥaqq Allāh* [relating to public interests], *shahādah* is accepted without a prior action. Action has already become incumbent on everyone who has a *khaṣm* to be charged and thereby it is deemed that claim has been established. See *Sh.Bāz*, vol.II, p.1020.

¹⁰⁹ Maj. 'Adliyyah, art.1706 : [*tuqbal al-shahādah in wāfaqat al-da'wā - wa in lā lā*]. It is required that the conformity is in all aspects like genus, quantity, method, time, mode of action, attributes and so on. See *Sh.Bāz*, vol.II, p.1042.

¹¹⁰ *Civil*, p.464.

¹¹¹ Maj. 'Adliyyah, art. 1707 : [*muwāfaqat al-shahādat li 'l-da'wā immā bi sūratī muṭābaqatihā bi 'l-tamām aw bi kawṇ al-mashhūd bihi aqall min al-mudda' bihi*].

Thus evidence for more than five hundred is regarded as admissible.¹¹² In an action claiming absolute ownership, which does not state how the ownership has been acquired, evidence from the witnesses of details of the origin of ownership is admissible.

In cases involving debt, evidence given contrary to the claim is inadmissible. For instance, if the plaintiff claims payment of one thousand piastres alleged to be due as the price of a sale and the witnesses give evidence to the effect that the defendant owes such sum in respect of a loan, their evidence is inadmissible.¹¹³ As far as contradictory evidence is concerned, article 1712 speaks about contradiction in respect of the object (*al-mashhūd bihi*) on which the evidence given is inadmissible. Article 1713 touches the question of contradiction in matters related to the object which has an effect on the case, the evidence is inadmissible too. Article 1715 discussed contradiction as to the amount of the price in the evidence of the witnesses in an action on a contract as rendering the testimony as inadmissible.¹¹⁴

There are two views in Islamic law concerning the administering of an oath to a witness. The first group maintains that no oath is required as uttering the word testimony (*shahādah*) implies giving an oath. This view is held by the Ḥanafī school. The second view requires the administering of the oath because it maintains that the trustworthiness of witnesses comes to be in doubt and therefore it should be reinforced by oath. Ibn Qayyim al-Jawziyah commented: "If a judge is entitled

¹¹²Maj. 'Adliyyah, art.1708.

¹¹³Maj. 'Adliyyah, art.1711 : [*lā tuqbal al-shahādah idhā khālafat al-da'wā fī sabab al-dayn - mathalan idhā idda'ā 'l-mudda'ī alfan min thaman al-mabī' wa shahida 'l-shuhūd 'alā 'l-mudda'ī 'alayh bi alfin min jihat al-qarḍ fa lā tuqbal shahādatuhum*].

¹¹⁴Civil, pp.467-469.

to separate between witnesses if his suspicion were to be aroused as to their veracity, it would be even more proper in that case to make them take an oath.” This standpoint is supported by Imām Ibn Abī Laylā, Muḥammad ibn Bashīr judge of Cordova and Ibn Nujaym.¹¹⁵

d] Oath

The third method of proof is oath. An oath may only be sworn in the name of God according to a ḥadīth which reads: “He who swears by no other than [by the name of God].”¹¹⁶ If a person brings an action against another and the latter denies the claim, the plaintiff must produce evidence. Failing that, he may ask that the defendant be required to deny the claim under oath. Otherwise, the plaintiff’s claim would be rejected. This is evident in a case presided over by the Prophet, when he asked the plaintiff, “Do you have any evidence?”. The plaintiff replied in the negative whereupon the Prophet said to him, “You may ask for his [defendant’s] oath”. The plaintiff replied, “He readily swears and does not care”. The Prophet said, “You have nothing but these, either your two witnesses or the defendant’s oath”.¹¹⁷ The oath has been sanctioned in cases involving property and chattels but it is not usually acceptable in criminal cases involving public rights. If a plaintiff tenders the oath to the defendant, three courses may be followed : the

¹¹⁵*Maj. ‘Adliyyah*, art.1727 : “Should the person against whom evidence is given ask the court, before giving judgement, to make witnesses take oaths that their evidence is not false, the court may, if it deems necessary, strengthen that evidence by administering the oath. The court may inform the witnesses that their evidence will not be accepted unless they swear an oath.” See *Falsafat*, p.185.

¹¹⁶Al-Suyūṭī, *Jāmi‘ al-Ṣaghīr* no.9866 cited in *Falsafat*, p.190.

¹¹⁷Al-‘Aynī, *‘Umdat al-Qāri’*, vol.XIII, p.243 and 248. See also *Mabsūṭ*, vol.XVII, 30.

defendant may take the oath, he may refuse to do so or he may demand instead that the oath be taken by the plaintiff himself.¹¹⁸

In the situation where the defendant opted to testify under oath to maintain his freedom from the alleged liability, the plaintiff's claim would be dismissed. A matter of dispute is whether there can be any testimony after an oath has been taken. There are three views on this issue. The first group¹¹⁹ maintains that the oath is a weak method of proof. Evidence is the original method of proof and thus the oath is regarded as a substitute which can be overridden by the original method. The Caliph 'Umar is reported to have said, "A deceitful oath is more deserving of rejection than trustworthy evidence". The second group¹²⁰ permitted a plaintiff to submit evidence to support his claim after defendant had testified under oath on condition that the plaintiff was not aware of the existence of this evidence when he asked for the defendant's oath. Otherwise such action is not acceptable. The third group considers the oath as decisive in a dispute and therefore a plaintiff may not give any testimony thereafter. They argued that the oath cancels the right of the plaintiff and no evidence may be presented on the basis of a right already discharged.¹²¹

On the other hand, if the defendant refuses to take the oath, judgement would be given against him essentially because of his refusal or alternatively, the

¹¹⁸*Mabsūt*, vol.XVI, p.119; *Badā'i*, vol.VI, p.229; *Umm*, vol.VII, p.34; Mālik, *Mudawwanah*, vol.XIII, p.24; *Wajīz*, vol.II, p.265; *Mughnī*, vol.XII, p.124; *A'lām*, vol.III, p.344; Ibn Rushd, *Bidāyat al-Mujtahid*, vol.II, p.386; Ibn Qayyim, *al-Ṭuruq al-Hukmiyyah*, p.117.

¹¹⁹This group is supported by Ibrāhīm al-Nakha'ī, Shurayh and the Ḥanafī, Shāfi'ī and Ḥanbalī. Ibid.

¹²⁰Supporters of this view include Mālik and a number of Shāfi'ī jurists including al-Ghazālī. See *Wajīz*, vol.II, p.265.

¹²¹*Falsafat*, p.191.

plaintiff would then be asked to take the oath. According to the Ḥanafīs and one version of the Ḥanbalīs, refusal is treated as tantamount to admission. It is argued that if he was honest, he should not have hesitated to take the oath. The oath should not be demanded of the plaintiff whether the defendant has requested that or otherwise. The provision in the Sharī‘ah on such matter is categorical that : “The burden of proof is on him who claims and the oath on him who denies”. The Majallah adheres to this interpretation:

“If the defendant refuses to take the oath, the judge shall deliver judgement based upon such refusal. If the defendant states that he is prepared to swear an oath after judgement has been so delivered, the judgement shall remained undisturbed.”¹²²

There is another opinion held by other schools of law including the second version of the Ḥanbalis that the refusal of the defendant to take an oath is not in itself a sufficient ground to pass judgement against him. Such a refusal is a weak method of proof which must be corroborated by the oath of the plaintiff whether arising from the defendant’s request or not. If the plaintiff takes the oath, judgement would be given in his favour. If not, his case would be rejected. They argued that the ḥadīth referred to above does not mention the possibility that the defendant may refuse to take the oath.¹²³

The oath is one of the oldest means of proof and has been adopted widely in legal proceedings. It is generally based on the principle of reminding the swearer of his religious faith and of God who requires truthfulness and integrity. Despite that, judicial experience shows that the oath is a weak method not resorted to

¹²²Maj. ‘Adliyyah, art.1820 reads: [idhā nakala ‘l-mudda‘ī ‘alayh ‘an al-yamīn ḥakama ‘l-hākīm bi nukūlih, wa idhā arāda ba‘d dhālika an yaḥlif lā yaltafīt ilā qawlih]. See Sh. Bāz, vol.II, p.1179.

¹²³Falsafat, p.193.

except in the absence of other evidence and that the persons asked to swear the oath usually do so easily, except on rare occasions.¹²⁴

e] Written Evidence.

In the present day, written evidence consisting of documents and written instruments is one of the most important and effective method of proof. This due to the prevalence of literacy, complexity of trade and commerce, lack of people's integrity and so on. In Islamic law, personal testimony was dominant due to lack of writing and recording in the olden days and the fact that people were not accustomed to the use of written documents¹²⁵, at least during the earlier part of Islamic civilization. Another main reason is the Qur'ānic prescription to write a contract was interpreted as a simple recommendation confined only to loans : "O you who believe, when you contract a debt for a fixed time, record it in writing".¹²⁶ Therefore the texts of Islamic law did not attach much weight to written evidence and there are many controversies concerning conditions for accepting written evidence. At any rate, it was not regarded as one of the primary method of proof but was merely mentioned in connection with admission by writing and giving testimony to ascertain the authenticity of such writing.¹²⁷

¹²⁴*Falsafat*, p.194.

¹²⁵A written document was deemed as a kind of *aide-mémoire* with no probatory force in its own. This force stemmed from the witnessing of the accord of the contracting parties whether such an accord was verbal or written. See Nabil Salleh, "Remedies for Breach of Contract Under Islamic and Arab Laws," *ALQ* [1987], pp.269-290; *Maj. Adliyyah*, arts.1736-1739. Also see discussion on the importance of written documents as a mean of security in chapter II, *supra*.

¹²⁶*Q.*, al-Baqarah [2] : 282.

¹²⁷Details could be found in *Mabsūṭ*, vol.XVIII, p172; *Tabṣīrat*, vol.I, p.294.

As the need to resort to written evidence is increasing, some jurists¹²⁸ have lifted the position of such method by applying *istiḥsān* (juristic preference).¹²⁹ The Majallah adopted the same course and recognized proof by means of promissory notes, register of merchants and the like provided that they were free from forgery and fabrication. It considers admission in writing the same as oral admission and it recognized official documents if they were free from any taint of fraud like the government's rescripts, entries in land registers and court files.¹³⁰

Samir Saleh is still pessimistic about such perceptions. He considers that the timid modern attempt to outline the advantage of written evidence has not changed its position from an ancillary method to that of oral evidence. It is true that the Ḥanafī school in articles 1606 to 1612 and articles 1736-1739 of the Majallah recognised the value of private deeds, court registers and trade registers as evidence provided that there are free from alteration and forgery. However this recognition is lessened by the wordings of article 1610 and 1737 which are quick to

¹²⁸*Mabsūt*, ibid.; *Ashbāh N.*, 86.

¹²⁹The Ḥanafī jurist al-Sarakhsī [d.483/1090] considers *istiḥsān* to be a method of seeking facility and ease in legal injunctions. It involves a departure from *qiyās* in favour of a ruling which dispels hardship and brings about ease to people. Al-Sarakhsī said : Avoidance of hardship [*rafʿ al-ḥaraj*] is a cardinal principle of religion which is enunciated in the Qurʾān that "God intends facility for you and He does not want to put you in hardship". [al-Baqarah [2] : 185] .Regarding *istiḥsān*, Kamali commented : "*Istiḥsān* is an important branch of *ijtihād* and has played a prominent role in the adaptation of Islamic law to the changing need of the society. It has provided Islamic law with necessary means with which to encourage flexibility and growth. Notwithstanding a measure of juristic technicality which seems to have been injected into an originally simple idea, *istiḥsān* remains basically flexible and can be used for a variety of purposes.....Juristic preference is a fitting description of *istiḥsān* as it involves setting aside an established analogy in favour of an alternative ruling which serves the ideals of justice and public interest in a better way". See Mohd.Hashim Kamali, op.cit., pp.246-247.

¹³⁰Provisions of the Majallah article 1736 reads : No action may be taken in writing or a seal alone. If such writing or seal is free from any taint of fraud or forgery, however, it becomes a valid ground for action, that is to say, judgement may be given thereon. No proof is required in any other way. Subsequently, article 1737 speaks about the validity of the *Sulṭān*'s rescript as well as land registers. Article 1738 is on registers kept by the court as a guarantee from any irregular practices and deception. See *Civil*, p.475.

deny the evidentiary value of written deeds if the defendant denies their authenticity. Moreover, it is doubtful whether the Māliki, Shāfiʿī and Ḥanbalī schools would grant the evidentiary strength given by the Ḥanafī Majallah to private deeds and trade registers. Thus oral evidence would still prevail over private and even notarized deeds whose contents are open to challenge, without necessarily alleging forgery.¹³¹

f] Supplementary Sources of Evidence

Presumption (*qarāʾin*), personal knowledge of the *qāḍī* (*ʿilm al-qāḍī*), expert opinion (*raʾy al-khabīr*) are among other supplementary methods of proof. As far as presumption is concerned, it is only favoured by a minority of jurist like Ibn Qayyim who speaks about enlarging the scope of evidence. The Ḥanafīs, through the Majallah, have attempted to developed a definition of conclusive presumption (*qarīnah qāṭiʿah*)¹³² but have heavily concentrated on criminal cases. Despite that, there are a few examples on civil matters like : “Judgement shall be given in respect of any matter which has been proven at any particular time unless the contrary is proven”.¹³³ The example quoted to illustrate this provision concerns the contest of absolute ownership. Ownership of a person at any particular time shall be held to be valid unless circumstances arise which invalidates such ownership.

¹³¹ *Arbitration*, pp.65-66.

¹³² *Maj. ʿAdliyyah*, art.1740 reads : [*al-qarīnah al-qāṭiʿah aḥadu asbāb al-ḥukm ayḍan*] and article 1741 reads : [*al-qarīnah al-qāṭiʿah hiyā ʿl-imārah al-bālighah ḥadd al-yaqīn*]. See *Durar*, pp.340-341.

¹³³ *Maj. ʿAdliyyah*, art. 10 reads : [*mā thabata bi zamān yuḥkamu bi baqāʾih mā lam yaqum dalīl ʿalā khilāfih*]

Another presumption is provided for at article 44 which reads :
 “Commercial custom in a trading community is deemed to be part of the agreement between traders who are parties to a contract”¹³⁴ as we have already seen. In the matter of the personal knowledge of the *qāḍī*, except for the early Ḥanafī scholars who authorised the *qāḍī* to decide on financial matters based on his own personal knowledge, the Mālīkī and majority of the Shāfi‘ī and the Ḥanbalī schools do not allow such practice.¹³⁵ Ibn al-Qayyim also advocated the use of *ra‘y al-khabīr*, a person whose expertise is essential to assist the court to settle a case.¹³⁶

4.5 Pleas and Defences.

As part of the *Sharī‘ah*’s scheme of fair trial, litigants are allowed to submit their defences. The jurists have expressed their approval for that as they unanimously agreed on its legality (*mashrū‘iyyat al-daf‘*) and allowed both parties to resort to it. They also suggested that it is a proper responsibility of the *qāḍī* to follow this procedure, whether the defence is from the defendant or from the plaintiff in response to the defence in order to refute the defence advanced by the defendant.¹³⁷

¹³⁴The maxim reads : [*al-ma‘rūf bayn al-tujjār ka ‘l-ma‘rūf baynahum*].

¹³⁵*Arbitration*, p.67.

¹³⁶Ibn al-Qayyim, *al-Turuq al-Ḥukmiyyah*, p.188.

¹³⁷*Durar*, vol.IV, p.186-196; *Mabsūṭ*, vol.XVI, p.63; *Ashbāh N.*, p.225; *Sh.Bāz*, p.932 ; *Maj.Shar‘iyyah*, p.622; *Adab al-Qaḍā’*, p.471; *Tabṣirat*, vol.I, pp.161-166; *Qawānīn*, p.310. Also see Muḥammad Rākān Ḍayf Allāh al-Daghmī, *Da‘wā al-Tanāquḍ wa ‘l-daf‘ fī ‘l-Sharī‘ah al-Islāmiyyah*, pp.156-157.

Briefly, defences in the form of seeking exemption from liability is one of the most common pleas heard in court. In respect of *ḍamān* cases, it is known as *ʿawāriḍ al-ḍamān* [waivers from liability]. In most situations, this type of defence is attributed to legal capacity and competence (*ahliyyah*). Under Islamic law, the capacity of human being to exercise rights and discharge obligation is twofold.¹³⁸ Firstly, a potential passive right to acquire rights (*ahliyyat al-wujūb*)¹³⁹ and secondly, an effective active capacity to exercise rights and discharge obligation (*ahliyyat al-adāʾ*).¹⁴⁰

¹³⁸*Arbitration*, p.26.

¹³⁹Receptive legal capacity may either be deficient (*nāqiṣah*) or complete (*kāmilah*). The receptive legal capacity of a child in the womb is incomplete in the sense that it can only receive rights such as inheritance (*mīrāth*) and bequest (*waṣīyyah*) but cannot bear any obligation toward others. Receptive legal capacity is complete when a person can both have rights and bear obligations. This type of legal capacity is acquired by every human being as of the moment of birth. During infancy and later stages of childhood [namely the age of reason - *tamyīz*], a child is capable of discharging, albeit through his guardian, certain obligations like maintenance, liability for loss (*ḍamān*) and payment for services rendered to him. See Muhammad Hashim Kamali, op.cit., p.446.

¹⁴⁰Legal active capacity is envisaged in three possible situations. [1] A person totally lacking in active legal capacity such as a child during infancy or an insane of any age. Since neither is endowed with the faculty of intellect, no legal consequences are accrued from their words and acts. When a child or a madman kills someone or destroys the property of another person, they can only be held liable with reference to property not life. They can only shoulder civil liability but not criminal responsibility. [2] A person may be partially lacking in active legal capacity. Thus a discerning child (*sabī al-mumayyiz*) [between the age of seven and about fifteen] and an idiot (*maʿtūh*) who is neither insane nor totally lacking in intellect but whose intellect is defective and weak possess legal capacity which is deficient....They are capable only of concluding acts and transactions that are totally to their benefit such as accepting a gift or charity even without the permission of their guardians. But if the transaction in question is totally disadvantageous to them, such as giving a gift or suretyship these are not valid at all even with the guardian's approval. As for transactions which partake both benefit and loss, they are valid but only with the permission of the guardian. [3] Active legal capacity is complete upon attainment of intellectual maturity [some jurists require *bulūgh* [age of puberty], some require *rushd* [prudence; adulthood]]. Hence every adult who has acquired this ability is presumed to possess active legal capacity unless there is evidence to show that he or she is deficient of intellect. Persons who are fully competent may sometime be put under interdiction (*ḥajr*) with a view to protecting the rights of others. A person may be interdicted by mean of a judicial order which restrict his powers to conclude certain transaction. A debtor may thus be interdicted so that the right of his creditors may be protected. Abu Ḥanīfah held, contrary to the majority of jurist, that foolishness (*safāhah*), indebtedness (*ghārim*) and carelessness (*ghaflah*) do not affect the active legal capacity. He said that the benefit of interdiction in these cases is outweighed by its possible harm. See M.H.Kamali, op.cit., pp.446-447. Cf. Abdurrahim, *Islamic Jurisprudence*, p.220.

Generally, one will be able to make a defence on various grounds namely minority (*ṣighar*), insanity (*junūn*), prodigal (*ṣafāhah*), embicility (*‘atah*) and being under duress (*ikrāh*). In the *fiqh* literature, this subject has been treated extensively as to determine whether or not a transaction is executed by a competent person. The status of the transaction being valid (*ṣaḥīḥ*) or invalid (*bāṭil*) is a basis to determine the application of any remedial measures including *ḍamān* when responsibility of the party committing the wrong is established. It will be concerned with,

“The legal capacity of the *maḥkūm ‘alayh*, that is the person to whom the *ḥukm* is addressed and it looks into the question whether he is capable of understanding the demand that is addressed to him and whether he comprehends the grounds of his responsibility (*taklīf*). Since the possession of mental faculty of *‘aql* is the basic criterion of *taklīf*, the law concerns itself with the circumstances that affect the sanity and capacity of the individual such as minority, insanity, duress, intoxication, interdiction and mistake”.¹⁴¹

Such a rule has been overwhelmingly concentrated in the area of breach of contracts primarily concerned with redress to remove *ḍarar* in the sense of *gharāmah*. The issue of *kafālah* occupies less space because as a gratuitous contract the capacity of the parties to the contract will be determined prior to its conclusion. Nevertheless, any problem arising could still be resolved by the same parameter. However, such a defence in civil matters is not conclusive and has not a similar strength compared to that of criminal cases. The notion of *ḥurmat al-māl* is a strong element in *ḍamān* and is automatically established by mere occurrence of the event. The judge has to bear this in mind in deciding any claim. A criminal case, on the other hand, requires a stricter rule especially in establishing criminal responsibility (*mas’ūliyyah jinā’iyyah*). The nature of the criminal conviction which

¹⁴¹ M.H.Kamali, op.cit., pp.444-447.

requires “proof beyond any doubt” [*idra’ al-ḥudūd bi ’l-shubuhāt*] is the main distinguishing criterion.

Muḥammad Fawzī Fayḍ Allāh has also suggested that defence can be instituted under the theory of negation of liability (*intifā’ al-ḍamān*).¹⁴² Among other grounds cited are personal defence (*difā’*), necessity (*darūrah*), execution of a directive (*tanfīdh al-amr*), permission by the owner (*idhn al-mālik*) and permission by the ruler (*idhn walī al-amr*). From a different perspective Subḥī Maḥmassānī argues defence on cessation of obligation (*suqūṭ al-mūjibāt*), which can either be based on the agreement of the parties or otherwise.¹⁴³ Maḥmassānī mentioned performance or satisfaction of the obligation (*ifā’*), replacement (*istibdāl*), renewal of the obligor (*tajdīd al-mūjib*)¹⁴⁴ and release (*ibrā’*) as examples for methods based on agreement. On the other hand, methods without agreement are merging of obligation (*ittiḥād al-dhimmah*)¹⁴⁵, set-off (*muqāṣāh*), impossibility of performance (*istiḥālat al-tanfīdh*) and lapse of time (*murūr al-zaman*).¹⁴⁶

4.6 The Theory of Damages.

Every injurious act inflicted in any form will bring about loss and suffering (*ḍarar*) and is in antagonistic to law and order. As such, the *Sharī‘ah* needs to impose sanction that will remove that particular *ḍarar*. This concept is founded on

¹⁴²Naz. *Ḍamān ‘Āmm*, p.195.

¹⁴³Details on the subject of *suqūṭ al-mūjibāt* could be found in *Mūjabāt*, pp.541-594.

¹⁴⁴Murshid, arts.250-252.

¹⁴⁵Maj. ‘Adliyyah, art.667.

¹⁴⁶Maj. ‘Adliyyah, art.1660.; Sh. Zarqā’, 483; *Mūjabāt*, pp.571-594.

the authority of the maxim : “Injury must be removed” [*al-ḍarar yuzāl*]. Injury cannot be inflicted neither as fresh action nor as retaliation (*lā ḍarar wa lā ḍirār*).¹⁴⁷ The infliction of *ḍarar* as a reaction to a *ḍarar* is strongly prohibited in Islamic law. Retaliation in cases involving properties is prohibited by a celebrated maxim : An injury should not be removed by another injury [*al-ḍarar lā yuzāl bi ḥ-ḍarar*]. The infamy of *jināyat al-itlāf* could likely be removed by demanding the liable person to replace the damaged property. The similar indentical property will remedy the injury suffered by the victim. Inflicting a similar injury will not bring about any solution to the problem.¹⁴⁸ This is called *taʿwīd* which means removing the material injury inflicted on a person aiming thereby to prevent recurrence of the injury and multiplication of evil and suffering.¹⁴⁹

The Sunnah has clearly ruled that “*al-taḍmīn bi ḥ-mithl lā itlāf al-naẓr*” [compensation is by replacing a similar merchandise not committing the similar damage. ʿĀʾishah was asked by the Prophet to replace a similar wooden food container belonged to another wife, Ḥaḥṣah. This settlement is believe to be good for both parties. The injured party will get back her property and everything is presumed to be rectified and back to normal. The benefit of use and perfect ownership has been restored.¹⁵⁰

Imposition of some kind of kind of penalty to the wrongdoer by way of compensation will serve the purpose of redress. By that, he suffers lessening of his

¹⁴⁷*Ashbāh N.*, p.85; *Ashbāh S.*, p.83; *Maj. ʿAdliyyah*, art.20. Al-Ṭarabulusī in his book mentioned three stages involved in looking into various cases. First, the liability must be established. Secondly, a judgement must be pronounced and thirdly, carrying out the decision. As far as carrying out the judgement, particularly involving property, is by warrant of arrest, confiscation of property, returning the right to its bearer and releasing all the detained rights. See *Muʿīn*, p.51.

¹⁴⁸*Mutlifāt*, p.563.

¹⁴⁹*Naz. Ḍamān ʿĀmm*, p.157-161.

¹⁵⁰Ibn Ḥajar, *Fath al-Bārī*, vol.VI, pp.49-50.

property which is taken to pay for *ḍamān*. This method is deemed to be more beneficial (*anfaʿ*), do more improvement (*aṣlah*) and suit human instinct and nature. The objective is nothing but to remove the injury (*rafʿ al-ḍarar*). There are fundamental difference between civil and criminal offences as regards methods of redress. The nature of the wrong committed in criminal cases renders the implementation of similar injury (as in the case of *qiṣāṣ*) sanctioned by the law, as that is the only suitable way of redress. In civil cases, that method is not viable. The legislation of *ḍamān* in most civil cases and *qiṣāṣ* in some criminal cases has its own merits, as : "God did not equate between the two matters in their nature, neither in people's perception towards it nor in the law formulated [*fa mā sawwā Allāh bayn al-amrayn fī ṭabʿ wa lā ʿaql wa lā sharʿ*].¹⁵¹

It has been an embodied golden rule of the *Sharīʿah* that rights (*huqūq*) should be returned in their original form if possible.¹⁵² *Radd al-ʿayn* is regarded as the original obligation (*al-mūjib al-aṣl*) and accepted as just in removing *ḍarar* and the impairment in both form and essence. *Ḍamān al-mithl* (replacement of similar merchandise) is the best form of redress if *radd al-ʿayn* is impossible. The next possible means is *ḍamān al-qīmī* (paying the value). *Ḍamān al-mithlī* is a better

¹⁵¹ *Aʿlām*, vol.II, p.229; *Madkhal*, vol.I, p.576,963,965 ; *Naḥ.Ḍamān*, p.90. In civil cases, the role of *taʿzīr* (discretionary punishment) is vital. It is evident from its etymological meaning, which originate from *ʿazr*, denoting "to prevent, to respect and to reform". Legally, it is a punishment aimed at preventing the wrongdoer from committing the offence again. It has been perceived as the discretionary punishment to be delivered for transgression against God or against an individual for which there is no fixed punishment nor penance. It equals the fixed punishment (*ḥudūd*) in being designed to bring about reformation and provide warning. In this respect, other than relying on the normal method of redress through *ḍamān*, the *qāḍī* can impose a wide range of punishments, from which he choose the one suitable for the nature of wrong committed. It can be in the form of admonition (*waʿz*), reprimand (*tawbīkh*), threat (*tahdīd*), fine and seizure (*gharāmah wa muṣādarah*), imprisonment (*ḥabs*) and others. See *Tabṣīrat*, vol.II, p.200; *Maʿālim*, pp.73-78; al-ʿAwa, *Punishment in Islamic Law*, pp.96-119.

¹⁵² *Qawāʿid Ahkām*, vol.I , p.180; al-Qurāfī, *al-Furūq*, vol.I, p.214 ; Ibn Rushd, *Bidāyat al-Mujtahid*, vol.II, p.312; *Mughnī*, vol.V, p.374.

option among the two, as it is based on *mumāthalah* (proportionality) in respect of form (*ṣūrah*), appearance (*mushāhadah*) and substance (*maʿnā*), whereas in *ḍamān al-qīmī*, everything is based on mere estimation and conjecture.¹⁵³

Based on the standpoint of majority of the *fuqahāʾ* that *qīmī* property is to be compensated with its value, it is essential during the assessment of the compensation to consider the value of the property not the price.¹⁵⁴ It was reported in *al-Muwaṭṭaʾ* that Mālik was reported to have said it is not our established practice to reduce the value (*taḍʿīf al-qīmāh*). A liable man is asked to compensate the value of a riding animal according to the value on the day he took it.¹⁵⁵ The *Sharīʿah*, as reflected in the legal texts, is concerned with the point of time of the contract to determine compensation (*waqt taqdīr al-ḍamān*).¹⁵⁶ The value of a property differs from one time to another. In the event of unavailability of similar merchandise in the market, the judge or arbitrator, may determine that on the basis of certain rules.

Abū Yusuf opined that it should follow the value on the day of the appropriation (*yawm al-ghaṣb*). He said that since there is no supply in the market and no rules are available and therefore the value is determined based that on the existing value on the day the cause of *ḍamān* was effected. Muḥammad al-Shaybānī, ruled that the price on the day in which supply of similar goods stopped (*yawm al-inqītāʾ*) should be the guide. Abū Ḥanīfah, has ruled that deciding the

¹⁵³ *Mughnī*, vol.V, p.375; *Badāʾiʿ*, vol.V, pp.150-151; al-Marghinānī, *al-Hidāyah*, vol.IV, p.9.

¹⁵⁴ *Thaman* [price] is what has been agreed upon by the two contracting parties and subject to changing of its value. *Qīmāh* is the value of a thing based on certain parameter without subject to price fluctuation. Determination of value can be established by certification of two upright experts. See Ibn ʿĀbidīn, *Radd al-Mukhtār*, vol.IV, p.71.

¹⁵⁵ *Muwaṭṭaʾ*, vol.II, p.748.

¹⁵⁶ *Naz. Ḍamān ʿĀmm*, p.162.

value on the day of the adjudication (*yawm al-qadāʾ*) is reasonable.¹⁵⁷ The Majallah adopted the opinion of Abū Yūsuf.¹⁵⁸ Al-Shāfiʿī ruled that the determination of value should be based on the highest price from the time of the injury to the state of inability to obtain similar merchandise.¹⁵⁹

Conclusion

The treatment of the complicated legal matters especially on *ḍamān* has become not only easy but interesting subject, with the help of the maxims. They served as formulas in looking into various details of *fiqh*. It has a great role to play especially in complementing the role of *uṣūl al-fiqh* in the treatment of the *furūʿ* (branches) of *fiqh*. The brief survey on the procedural rules and law of evidence involved had demonstrated the viability of Islamic law in developing a sustainable legal system.

¹⁵⁷ al-Marghinānī, *al-Hidāyah*, vol.VIII, pp.246-247.

¹⁵⁸ Article 921 , 93, 53.

¹⁵⁹ *Sharḥ Maḥallī ʿalā Minhāj al-Ṭālibīn*, vol.III, p.33.

CHAPTER FIVE

INSTITUTIONAL FRAMEWORK FOR THE APPLICATION OF DAMĀN.

“To rule with justice and to render their dues to those who have a claim, constitute the essential principles of just government (*al-siyāsah al-‘ādilah*) and the very purpose of public office (*al-wilāyah al-ṣāliḥah*).”

[Ibn Taimiyah, *al-Siyāsah al-Shar‘iyyah*, p.16]

The application of *ḍamān* in respect of providing remedies to contractual faults and offering protection against transgression of rights can be carried out through various institutions. These institutions range from a tribunal with judicial authority, arbitration, an insurance company, a banking institution and others. This chapter is an attempt towards the evaluation of the role played by various institutions in Muslim civilisation, that had contributed in their own special way to the application of *ḍamān*. Such a discussion will reflect the extent that *ḍamān* is being used to help people settle their disputes, remedy any deficiency in their transactions as well as helping the authorities to administer justice. The institutions which will be surveyed are : [a] *al-qadā’* (court of law). [b] *al-maẓālim* (the higher authority) [c] *al-ḥisbah* (office of fair trading); [d] *al-taḥkīm* (arbitration) [e] *al-maṣārif* (banking and financial house) and [f] *al-ta’mīn* (insurance).

5.1 The Judicial Authority.

The judicial authority in Islamic law is generally known as *wilāyat al-qadā'*¹. Literally, *qadā'* signifies the meaning of completing (*imḍā'*), making (*ṣana'a*), satisfying (*adā'*) and limiting (*ḥaddadā*).² Technically, the jurists have come up with different definitions, which differ in their modes of expression but essentially represent the same basic idea. *Qadā'* is defined as conveying the legal value (*ḥukm shar'i*) by way of imposition of its order (*'alā sabīl al-ilzām*).³ It is also defined as concluding adversaries [*faṣl al-khuṣūmāt*] and settling disputes (*qaṭ' al-munāza'āt*) using a special method.⁴ Al-Buhutī's definition has an express clarity on the function of *qādī* as he said: "It is the implementation of the *Sharī'ah* rules and settlement of conflicts."⁵ The definition in *al-Iqnā'* read: "Settlement of disputes between two parties or more based on the *Sharī'ah* laws."⁶

The establishment of this authority is one of the highest priorities of religious obligation after the pronouncement of faith. It is also considered as the noblest form of worship and devotion to God.⁷ Furthermore, there has been a

¹Originally, this type of authority is categorised as *wilāyah 'āmmah* (authority of universal nature) in the sense that it is a jurisdiction over all people and mandated by the people [*wilāyah muta'addiyah wa mustamaddah min al-ghayr*]. However, the universal authority has been subject to limitations such as jurisdiction based on time, location and type of case, which has led to the judge as having a specialised and limited jurisdiction. The term *wilāyah* means administrative function (*tadbīr*), competence (*qudrah*), support (*nuṣrah*) and power (*sultān*). *Lisān*, vol.XV, pp.406-415. See Aḥmad Muḥammad Malījī, *al-Nizām al-Qadā'ī al-Islāmī*, p.17.

²*Lexicon*, Supplement pp.2989-2990.

³*Tabṣirat*, p.8

⁴Ibn 'Ābidīn, *Ḥāshiat Radd al-Mukhtār*, vol.V, p.352 ; Ibn Nujaym, *al-Baḥr al-Rā'iq Sharḥ Kanz al-Daqā'iq*, vol.VI, p.277.

⁵al-Buhutī, *Kashshāf al-Qinā' 'an Matn al-Iqnā'*, vol.VI, p.285.

⁶Muḥammad al-Sharbīnī al-Khatīb, *al-Iqnā' fī Ḥill Alfāz Abī Shujā'*, vol.II, p.290.

⁷*Fatawā*, vol.V, p.197 ; al-Buhutī, *Kashshāf al-Qinā' 'an Matn al-Iqnā'*, vol.VI, p.286; *Mabsūṭ*, vol.XVI, p.59.

prophetic precedent⁸ on such practice evident from the Qur'anic declaration : "O Dawūd ! We did indeed make thee a vicegerent on earth, so judge thou between men in truth".⁹ In another verse, it was mentioned : "We have sent down to thee the book that thou mightest judge between them as guided by God, so be not used as an advocate by those who betray their trust".¹⁰ The Qur'ān clarifies this by saying: "Mankind was one single nation. And God sent His Messengers with glad tidings and warnings and with them He sent the Book in truth to judge between people in matters wherein they disputed".¹¹

The sunnah of the Prophet has demonstrated a clear guideline to resort to judicial authority to settle any matter which suits the nature of its function. It was reported that the Prophet said : "Do you know the people who will first be given the shade of God on the day of judgement ?". The Companions replied : "God and His messenger know better". He said : "Those who are rendered with rights will accept them. When asked, they will exercise them and will pass judgement among people as they pass judgement on their ownselves".¹² In another report, the Prophet is reported to have passed a significant remark on the function of the judiciary:

"I am only a man and when you come pleading before me it may happen that one of you might be more eloquent in his pleadings and that as a result I adjudicate in his favour according to his [convincing] submission. If it so happens and I give advantage to

⁸Ibn Abī 'l-Damm has pointed out that [*al-qadā' tilwu al-nubuwwah*] and that is one reason of their appointment to that function. See *Adab al-Qadā'*, p.5.

⁹Q., Ṣād [38] : 26 reads : [*yā dāwūd innā ja'alnākā khālīfatan fī 'l-arḍ faḥkum bayn al-nās bi 'l-ḥaqq*]

¹⁰Q., al-Nisā' [4] : 105 reads [*innā anzalnāka al-kitāb bi 'l-ḥaqq li taḥkuma bayn al-nās bi mā arāka Allāh wa lā takun li 'l-khā'irīn khaṣīmā*].

¹¹Q., al-Baqarah [2] : 213 reads [*kānā 'l-nās ummatan waḥīdatan fa ba'atha Allāh al-nabiyyīn mubashshirīn wa mundhirīn wa anzalā ma'ahum al-kitāb bi 'l-ḥaqq li taḥkuma bayn al-nās fī mā ikhtalafū fih*].

¹²al-Shawkānī, *Nayl al-Awṭār*, vol.VIII, p.260.

one of you by granting him a thing which belongs to his opponent, he had better not take it because I would have been giving him a portion of hellfire.”¹³

In the Islamic legal system, the *qāḍī* basically represented ordinary justice, in contrast to other magistrates and to officials of other categories, who exercised extraordinary justice. One kind of Islamic court on the one hand, has been seen as operating with rigid rules and following a procedure and methods of proof which is set and imposed upon the interpreter of the law. On the other hand, there is also another court which has been freed from such rules and follows a procedure which has left scope to the judge's discretion and generally based upon equity. The first type of court was the *qadā'* and the second corresponded mainly to the institution called *maẓālim*. The function of the *qāḍī* and his jurisdiction has been described in the writings on Public law ¹⁴ by al-Māwardī or Abu Ya'qūb or by authors of *adab al-qadā'*¹⁵ like Māwardī, Ibn Abī 'l-Damm and Ibn Farḥūn.

"There are certain important exception to these principles. In the Mālikī school of law, aside from his ordinary judicial powers, the *qāḍī* enjoys a power of extraordinary justice called *al-siyāsah al-shar'īyyah*¹⁶, which allows the judge freedom in finding equitable solutions to litigations.”¹⁷

¹³This case involves a claim by two men on a property left as inheritance. Both of them pleaded without being supported by any evidence. When both heard the Prophet's statement, they broke into tears fearing the consequence of abusing the judicial institution for their own benefit. Then, they both settled the matter amicably as advised by the Prophet. Ibn Ḥajar al-ʿAsqalānī, *Fath al-Bārī Sharḥ al-Bukhārī*, vol.XIII, p. 134 ; al-Ṣanʿanī, *Subul al-Salām*, vol.IV, p.165; *Muwattaʿ*, p.488.

¹⁴Emile Tyan, "Judicial Organisation," in *Law in the Middle East* edited by Majid Khadduri and Herbert Liebesny, 1955, pp.259-260.

¹⁵It is a special thorough study on the conduct of judicial operations. In Islamic legal literature, this studies have been carried out by two groups; [a] the scholars who contributed on the theoretical foundation of judicial matters like duties and privileges of the *qāḍī*, rights of the litigants, methods of conviction, principles of fair trial and the like [b] the practitioners mainly those who have been on the bench as judges as they are able to reflect their practical experiences while conducting the trial. See Muḥammad Muṣṭafā al-Zuhaylī in his introduction to his edition of Ibn Abī 'l-Damm's *Kitāb Adab al-Qadā'*, pp.7-8.

¹⁶This concept has been clearly been the bedrock of their decisions. For instance in deciding on the liability of the artisans (*taḍmīn al-ṣunnā'*), Abū al-Ḥassan ʿAlī b. Raḥḥāl al-Maʿḍani and Ibn Farḥūn have indicated that decision was based on this concept. See *Taḍmīn*, p.2; *Tabṣīrat*, p. 45.

¹⁷Emile Tyan, op.cit., p.260.

a] The Need for the *Qādī*'s Court.

As the preceding discussion has clearly demonstrated the importance of *qaḍā'*, this part will specifically deal with the importance of *qaḍā'* in respect to the application of *ḍamān*. Al-Māwardī has clearly outlined ten functions of a *qādī*, although he has mixed purely judicial and administrative functions. The first three main function, arranged presumably on order of priority deal with settlement of litigations between individuals, enforcement of rights established in court and protection of the weak.¹⁸ However, it is suggested that it is worthwhile to look closely into the full statement of Māwardī on these matters as that will give a fuller perspective.

In the first function, al-Māwardī speaks about settlement of conflict (*faṣl al-munāza'āt*) and conclusion of any discord and adversity (*qaṭ' al-tashājur wa 'l-khuṣūmāt*), whether in the form of both parties agreeing to reconciliation (*ṣulḥ*) and agreement to any possible but permissible way out. Alternatively, a court order will be issued based on the evidence brought before the court and binding on the parties.¹⁹ Secondly, al-Māwardī came up with the idea of retrieving rights from a person who delayed returning them [or detained them] and returning them to the

¹⁸This translation of al-Māwardī's discussion in *Aḥkām Sulṭāniyyah* was provided by Emile Tyan. See Emile Tyan, op.cit., pp.261-262. See also Muḥammad Salīm al-ʿAwwa, *On the Political Side of Islamic State*, p.76. Also see H.F.Amedroz, "The Office of Qādī in the Aḥkām Sulṭāniyyah of Māwardī," *JRAS* (1910), pp.761-796. For the later development see Jennings, "Kādī, Court and Legal Procedure in the 17th Century Ottoman Kayseri," *SI* [1978], pp.133-172 and his "Limitation of the Judicial Powers of the Qādī," *SI*, pp.151-184.

¹⁹The text reads : [*faṣl al-munāza'āt wa qaṭ' al-tashājur wa 'l-khuṣūmāt immā ṣulḥan ʿan tarāḍ wa yurāʿī fihi al-jawāz aw ijbāran bi ḥukm bāt yuʿtabar fihi 'l-wujūb*] See *Sulṭāniyyah*, p.70.

rightful owner upon establishing the right of claim (*thubut al-istiḥqāq*) by either method of proof, namely admission (*iqrār*) or testimony (*bayyinah*).²⁰ In the third function al-Māwardī established that the *qāḍī* has an inherent competence over those who have been legally incapacitated as a result of insanity (*junūn*), minority (*ṣighar*) and he also has power to impose an interdiction order on the prodigal (*saḥīh*) and the bankrupt (*muḥlis*). This is to protect the property of the rightful owner and to remedy the contractual agreements therein.²¹ As has been dealt with in the preceding chapter, there is a limitation on the *qāḍī*'s function with regard to private rights particularly civil claims like *ḍamān* as it is only actionable upon claim.²²

The scholars have unanimously advocated that the process of claim (*daʿwā*) in demanding a right (*muṭālabat al-ḥaqq*) must be made in the authority of a person who can render the right to its original owner, once it is established.²³ The term "*man laḥū khalāṣ*" refers to the office of the *qāḍī* who is competent to resolve the disputes and pass judgement and impose them on the litigants.²⁴ This is why they are appointed to the post. The Majallah requires that a claim must be made in the presence of a *qāḍī*.²⁵ The phrase "*fī ḥudūr al-qāḍī*" signifies that a claim must be carried out in the presence of a judge, otherwise it cannot be described as such.

²⁰The text reads : [*istīfāʾ al-ḥuqūq min māṭil biḥā wa iṣālīhā ilā mustaḥiqqihā baʿd thubūt istiḥqāqihā min aḥad al-wajhayn iqrār aw bayyinah*] Ibid.

²¹The text reads : [*thubūt al-wilāyah ʿalā man kāna mamnūʿ al-taṣarruf bi junūn aw ṣighar wa ʿl-ḥajr ʿalā man yarā ʿl-ḥajr ʿalayh li safahin aw falasin ḥifẓan li ʿl-amwāl ʿalā mustaḥiqqihā wa taṣḥīhan li aḥkām al-ʿuqūd fihā*]. Ibid.

²²The text reads : [*iqāmat al-ḥudūd ʿalā mustaḥiqqihā, fa in kāna min ḥuqūq Allāh taʿālā tufriḍu bisīfāʾihī min ghayr ṭalab bi iqrār aw bayyinah, wa in kāna min ḥuqūq al-adamiyyīn kāna mawqūfan ʿalā ṭalab mustaḥiqqih*]. Ibid.

²³Durar, vol.II, p.329.

²⁴Ibn Humam, *Sharḥ Faḥ al-Qaḍir*, vol.VI, p.137.

²⁵Maj. ʿAdliyyah, art.1613 reads : [*al-daʿwā hiyā ṭalabu aḥadīn ḥaqqahu min ākhar fī ḥudūr al-qāḍī*]. See Durar vol.V, p.151.

‘Ali Ḥaydar includes the requirement of “*ḥāl al-munāza‘ah*” as excluding the claim which is at the stage of recconciliation.²⁶ The jurists have agreed that dispensing justice and realization of rights (*tahṣīl al-ḥuqūq*) through *qadā’* is indispensable. Resorting to judicial authority to settle disputes is almost mandatory and taking the law into one’s own hand is prohibited.²⁷

It was mentioned in a legal text that the compulsion to resort to judicial authority (*wujūb al-raḥ ilā ‘l-qāḍī*) is not absolute and failing to do so will not render the person sinful. What is prohibited is freedom of seeking remedies and settlement on his own without resorting to the appointed authority capable of doing so. Such action will bring about an unsystematic solution and potential problems.²⁸ The jurists have also allowed the use of extra-judicial methods of realization of right with certain qualifications. For instance, *darūrah* can be a reason for such an alternative method provided that the method will not bring about any evil and destructive consequences.

The *Sharī‘ah* has also advocated the rule of fair trial. Five basic principles of practical scope and importance can be extracted from various prescriptions relating to the conduct of trial. It is required that, the litigants are given strict equality of treatment, decisions can only be made after the *qāḍī* has heard both plaintiff and defendant, parties should be allowed to submit their evidences, pleas and defences and the *Sharī‘ah* has categorically ruled that substantive truth should prevail over procedural technicalities.²⁹ These meritorious qualities, aimed to be the guide for

²⁶‘Ali Ḥaydar, *ibid.*

²⁷*Qawā‘id Ahkām*, vol.II, p.198; *Muhadhdhab*, vol.II, p.217.

²⁸*M.Muhtāj*, vol.IV, p.462.

²⁹*Arbitration*, pp.67-71.

the judicial authority, have been embodied in the alleged letter containing all the laws governing the office of a *qādī* sent by ‘Umar al-Khaṭṭāb to Abū Mūsā which reads :

“ The office of a judge is a definite religious duty [*farīdah muhkamah*] and a generally followed practice [*sunnah muttaba‘ah*]. Understand the affidavit that are made before you, for it is useless to consider the plea that is not valid. Consider all people equal before you in your court and in your attention, so that the noble [*sharīf*] will not expect you to be partial and the humble [*daqīf*] will not despair of justice from you. The claimant must produce evidence; from a defendant an oath may be exacted. Compromise [*sulh*] is permissible among Muslims but not any agreement through which something forbidden would be permitted or something permitted forbidden. If you give judgement yesterday and today, upon reconsideration, come to the correct opinion, you should not feel prevented by your first judgement from retracting. Justice is eternal and it is better to retract than to persist on worthlessness. Use your brain about matters that perplex you and to which neither the Qur‘ān nor Sunnah seem to apply. Study similar cases and evaluate the situation through analogy with those similar cases. If a person brings a claim, which he may or may not be able to prove, set a time limit for him. If he brings proof within the time limit, you should allow his claim, otherwise you are permitted to give judgement against him. This is the better way to forestall or clear up any possible doubt.....avoid fatigue and annoyance at the litigants.³⁰

5.2 Mazālim : A Higher Authority

The study of the role of *qadā’* would be incomplete without incorporating the role of both *wilāyat al-mazālim* and *wilāyat al-ḥisbah*. The word *mazālim* [pl.*mazlimah*] means injustice or wrongful deed, generally perceived as putting things in a place not their own.³¹ Its opposite is ‘*adl* [justice] and it was the ruler’s primary responsibility to see that ‘*adl* prevailed. On this premise, he makes himself

³⁰Ibn Khaldun, *Muqaddimah* [tr.Rosenthal], pp.453-454; D.S.Margoliouth, "Omar's Instructions to the Qādī," *JRAS* X [1910], pp.307-325. See al-Kindi, *Kitāb al-Qudāt alladhīn Wallu Qadā’ Miṣr* [The History of the Egyptian Cadis] edited by R.J.H.Gottheil, 1908.

³¹*Lisān*, vol.II, p.649; *Lexicon*, vol.II, pp.1922-1923.

accessible to his subjects so that they would appeal directly to him against injustices in general and usurpation by government officials in particular.³² In the sense of its application to the particular institution, *mazālim* is seen as a forum for complaints against injustices committed by the strong against the weak.³³

On this issue, the work of al-Māwardī is again of central importance. In his *al-Aḥkām al-Sultāniyyah*, he provides a comprehensive survey of the various aspects of *mazālim* jurisdiction, its relationship to *qādī* and its procedure.³⁴ He also emphasized that the Caliph is the authority ultimately responsible for supervising *mazālim* though he will normally appoints a supervisor (*nāẓir*). Because of the nature of the institution, the *nāẓir* must combine in himself the authority of an administrator and the competence of a *qādī*. Only certain individuals are capable of undertaking the function of supplementing the deficient power of *qādī*. This includes the heir apparent (*walī al-‘ahd*), plenipotentiary minister (*wazīr al-tafwīd*) and provincial governors. The *mazālim* court is constituted by the *nāẓir* with various classes of assisting personnel, guards, legal advisors, scribes and witnesses who meet in regular publicized and open sessions.³⁵ The *nāẓir* may appoint an indi-

³²J.S.Nielsen, *Secular Justice*, p.1. He suggested that *mazālim*, at least in its idealized form, can be considered as an expression of phenomenon which appears also in ancient China and in the Swedish ombudsman of the 18th century. See E.A.Kracke, "Early Visions of Justice for the Humble in East and West," *JAOS* XVI (1976), pp.492-498.

³³ This has been expressed in a celebrated definition: "Supervision of the *mazālim* means bringing litigants to a settlement by fear and restraining them from conflict by awe." See J.S.Nielsen, "Mazālim and Dār al-‘Adl under the Mamlūk," *MW* LXVI (1976), pp.114-132. At the developed stage of the theory, there are reports in leading chronicles about the primacy of *mazālim* such that of Qalqashandī : "It is an important matter in which the wronged is given redress against wrongs, the truthful is protected from the liar, the weak is help against the strong and the law of justice (*qawānīn al-‘adl*) are kept in force throughout the realm." See Qalqashandī, *Ṣubḥ al-A‘shā*, vol.VI, p.204.

³⁴J.S.Nielsen, *Secular Justice*, p.17. See also H.F.Amedroz, "The Mazālim Jurisdiction in the Aḥkām Sultāniyyah of Māwardī," *JRAS* (1911), pp.635-674.

³⁵*Sultāniyyah*, p.66.

vidual or a council (*majlis*) to give him advice or to investigate, arbitrate or even to pass judgement on his behalf.³⁶

Al-Māwardī has enumerated ten functions of the *mazālim* which fall under the theme of the abuse of official powers and enforcement of the decisions of the *qāḍīs*. This study will confine its inquiry to the distinct way the *mazālim* contributed to the application of *ḍamān*. Plainly, the *mazālim* is seen as competent to implement the *qāḍī*'s decisions which have failed due to an inability to enforce them as a result of their weakness of the successful litigants in the face of his rivals, due to the latter's arrogance, power and high status. The *mazālim* will also intervene in areas concerning public interest in which the *muḥtasib* is unable to deal with, such as openly identifying the forbidden which he is too weak to prevent and the infringement of rights which he cannot defend.³⁷

The procedure of the *mazālim* is an open one so far as the power of decision and the means of establishing proof is concerned. It is not subject to limitations and the strict regulations of the procedure of the *qāḍī* court.³⁸ This is why Māwardī is said to have successfully attempted to keep the *mazālim* within the bounds of the established precepts of Islamic law but not the procedures of the *qāḍī* court.³⁹ While the *qāḍī*'s court normally must wait for an individual to raise a case before it can act in cases involving misuse of public authority, the *mazālim* court can take the initiative to investigate. The *mazālim* is distinguished from the *qāḍī*'s court by the much more liberal access to and use of evidence. The *mazālim* may

³⁶Ibid., pp.80-82.

³⁷J.S.Nielsen, *Secular Justice*, pp.22-23.

³⁸Emile Tyan, "Judicial Organisation," in *Law in the Middle East* edited by M.Khadduri and H.Liebensny, p.265.

³⁹J.S.Nielsen, "Mazālim" op.cit., p.116.

subpoena and investigate witnesses and take evidence independently of the parties to the case.⁴⁰ *Mazālim* has extensive power to refer to arbitration.

Regarding the *mazālim*'s alleged role as an appellate body, Nielsen said that such is quite difficult, except in the loose sense. It is the only place where the subject could appeal to sovereign justice. In the more technical sense of being an instance to which the decision of the lower courts could be referred for possible revision, the *mazālim*'s status of appeal court is supported by five cases of the Baḥrī Mamlūks.⁴¹ On the other hand, Kamali appeared to be more confident about the role of *mazālim* as an appellate jurisdiction.⁴² He said that although it was first known as an administrative tribunal which looked into disputes between the citizen against the state, it was also seen as a high court of appeal which entertained appeal against the decisions of the *qāḍī* courts. It is therefore not surprising that many observers have considered the *mazālim* as a high court of appeal (*maḥkamat al-isti'nāf*) and an integral part of the judiciary.⁴³

⁴⁰J.S.Nielsen, "Mazālim," op.cit., p.116.

⁴¹For details see J.S.Nielsen, *Secular Justice in an Islamic State Under the Baḥrī Mamlūks [662-789H / 1264-1387M]*, p.121.

⁴²M.H.Kamali, "Appellate Review and Judicial Independence," in *Islam and Public Law* edited by Chibli Mallat, p.62.

⁴³Fathī 'Uthmān, *al-Fikr al-Qānūnī*, pp.312-313 cited in Kamali, Ibid. In his article, Kamali has discussed the position of judicial review in Islamic law. According to him, evidence for such a practice could be drawn from 'Umar's letter to Abū Mūsā wherein it was mentioned that a *qāḍī* may review their own decision or correct any error that he may detect at any stage prior to enforcement. He quoted the opinion of al-Sarakhsī who allowed review to be carried out by the issuing *qāḍī* or another *qāḍī* may review the initial judgement. There are differences of opinion on the matter but notwithstanding the differences of interpretation, it is suggested that judges have authority under Islamic law to review their own decisions, whether such decision are flawed by personal erroneous reasoning or departure from the clear injunctions of the *Shari'ah*. Such a practice is based on few maxims such as "a ruling which opposes the text and consensus is reversible" [*yunqad al-ḥukm al-mukhālif li 'l-naṣṣ wa 'l-ijmā'*], "oppressive decisions of disreputable judges are reversible" [*tunqad aḥkām quḍāt al-jūr wa 'l-sū' idhā kānat jā'irah*] and "[decision which is] found to be manifestly wrong" [*khaṭa' bayyin lam yukhtalaf fih*]. See pp.66-83.

As a matter of fact, the place of the *mazālim* in Islamic judicial theory underlines the internal contradictions and tensions. It has no place in strict *Sharī'ah*, as is evident from its omission in the legal manuals. Only the Mālikīs allow *mazālim* a role in the discourse on *qadā'*, demonstrated in the writings of al-Qurāfī and Ibn Farḥūn. The *mazālim* has always been connected by the scholars to *siyāsah shar'īyyah*. The increasing use of *hiyal* (legal devices) and resorting to the jurisprudential justifications based on *istiḥsān* and *istiṣlah*, have been suggested as an explanation of this development.

5.3 Ḥisbah : The Enforcement Authority

Ḥisbah literally means arithmethical problem, sum or reward. It is also attributed to the act of computing or measuring.⁴⁴ The derivative *iḥtisāb*⁴⁵ could be associated with the activities of a person who invites others to do good (*ma'rūf*) and forbids them from evil (*munkar*) hoping to be rewarded in the Hereafter. Technically, *ḥisbah* connotes the state institution to promote what is proper and forbid what is improper.⁴⁶ The Islamic state has been enjoined to institute an efficient

⁴⁴*Lexicon*, pp.564-565.

⁴⁵To take into consideration or to anticipate a reward in the Hereafter by adding a pious deed to one's account with God. Ibid.

⁴⁶Muhammad Akram Khan, "al-Ḥisbah and the Islamic Economy," appendix in Ibn Taimiyyah, *Public Duties in Islām : The Institution of Ḥisba*, p.135. Muḥammad al-Mubārak in his book *Ārā' Ibn Taimiyyah*, 1973, p.73-74. opines : "It is a control function of the government through persons acting especially in fields of morals, religion and economy and generally in the areas of collective and public life, to achieve justice and righteousness according to the principles of Islām and commonly known good customs of the time and place." In his *al-Ḥisbah wa 'l-Muḥtasib fī 'l-Islām*, Nichola Ziadeh defines ḥisbah as the office to control the market and common morality (*ādāb*). See Abd al-'Azīm Iṣlāḥī, *Economic Concept of Ibn Taimiyyah*, p.187.

arrangement to oversee the implementation of *amr bi 'l-ma'rūf wa 'l-nahy 'an al-munkar*.⁴⁷

The Prophet and the four Khulafā' al-Rāshidīn are reported to have carried out the function of *muhtasib* themselves.⁴⁸ The provincial governors have acted as *muhtasib* on behalf of the caliph. During the Abbasid caliph Abū Ja'far al-Manṣūr, a separate department of *ḥisbah* was established. Full-time professional *muhtasib* was appointed together with qualified supporting staffs known as *'arif* and *amīn*. The office of a *muhtasib* is well received at every stage of Islamic history.⁴⁹ In various places, they are known with various designation other than *muhtasib*, like *ṣāhib al-sūq* in North Africa, *muhtasib aghāsī* in Turkey and *Kotwal* in India.⁵⁰ As a result of a meticulous development, unlike the *mazālim*, there is a wealth literature dealing with *ḥisbah*, both in theory normally written by the classical jurists⁵¹ and practical elucidations by the *muhtasibs* themselves.⁵²

⁴⁷Q., Āl 'Imrān [3] : 110 reads : Ye are the best of peoples evolved for mankind enjoining what is right and forbidding what is wrong and believing in Allāh.

⁴⁸At this initial stage, this function is better known for supervising the *sūq* [marketplace] before it evolved to a more sophisticated institution later. The theme is presumably the same, the difference is only the operation. Al-Sā'ib b. Yazīd claims that he was an *'āmil 'alā sūq* in Madīnah during the reign of 'Umar al-Khaṭṭāb. This is noted to be the first time such designation was ever used for an Eastern market inspector, before it was replaced by the title *muhtasib*. The role of *'āmil al-sūq*, after *ḥisbah* had been fully institutionalised during the Abbasid, seem to be declining. Interestingly, the surviving Umayyad family in Spain had preserved the function of *ṣāhib al-sūq*, a clear transposition of the Eastern *'āmil al-sūq*. R.P. Buckley, "The Muhtasib," *Arabica* XXXIX [1992], pp.59-67. For details on market inspection in the Islamic West see Yaḥyā b. 'Umar, *Kitāb al-Nazar wa 'l-Aḥkām fī Jamī' Aḥwāl al-Sūq*, 1975.

⁴⁹Buckley, op.cit., pp.60-62.

⁵⁰Muhammad Akram Khan, op.cit., pp.136-137.

⁵¹The most celebrated texts are : a) Ibn Taimiyah, *al-Ḥisbah fī 'l-Islām*. b) al-Māwardī, *al-Aḥkām al-Sultāniyyah*. c) al-Ghazālī, *Iḥyā' Ulūm al-Dīn*.

⁵²Among other manuals of *ḥisbah* are :

a) *Nihāyat al-Rutbah fī Ṭalab al-Ḥisbah* by al-Shayzarī.

b) *Nihāyat al-Rutbah fī Ṭalab al-Ḥisbah* by Ibn Bassam.

c) *Ma'ālīm al-Qurbah fī Aḥkām al-Ḥisbah* by Ibn Ukhuwwah

d) *Fī Adāb al-Ḥisbah* by Muḥammad al-Saqatī.

e) *Kitāb al-Ishārah ilā Maḥāsīn al-Tijārah* by Abū 'l-

Faḍl Ja'far b. 'Alī al-Dimashqī.

Al-Māwardī declared that the jurisdiction of the *ḥisbah* lies midway between the *qadā'* and that of *maẓālim*.⁵³ There are Qur'anic references which have been taken to define the role of the *muḥtasib* in cases of short weight or measure, commercial frauds and unjustified delay in payment of debts.⁵⁴ Where debt is acknowledged, the *muḥtasib* may compel payment.⁵⁵ These roles clearly serve the purpose of applying *ḍamān*, in either sense of *kafālah* or *gharāmah*, if a proven *ḍamān* arises. In these matters, the authority of *muḥtasib* is equal with that of the *qāḍī*. It is inferior to it in that he is not permitted to deal with cases in which the wrong is not immediately obvious. For instance, he may not deal with contracts and agreements except where there is a specific authoritative text on the subject. Furthermore, a *muḥtasib* may only deal with cases in which the wrong is admitted. Where there is any dispute the hearing of evidence becomes necessary and need reference to a *qāḍī*.⁵⁶

Despite those limitations, the *muḥtasib*'s authority is greater than of the *qāḍī*'s in certain respects. He may proceed independently of any complaint to

⁵³H.F.Amedroz, "The Ḥisba Jurisdiction in the Aḥkām Sulṭāniyyah of Māwardī," *JRAS* (1916), pp.77-101; 287-314.

⁵⁴Various Qur'anic injunctions quoted in this respect are:

a) al-Muṭaffifīn [83] : 1-3 reads : Woe to those that deal in fraud, those who, when they have to receive by measure from men exact full measure. But when they have to give by measure or weight to men, give less than due.

b) al-Shu'arā' [26] : 181-183 reads : Give just measure and cause no loss [to others by fraud] and weight with scales true and upright. And withhold not things justly due to men, nor do evil in the land, working mischief.

c) al-Nisā' [4] : 107 reads : Contend not on behalf of such as betray their own souls for Allāh loveth not one given to perfidy and misdemeanor.

d) Yūsuf [12] : 52 reads : This [say I], in order that he may know that I have never been false to him in his absence and that Allāh will never guide the snare of the false ones.

⁵⁵*Ma'ālim*, pp.4-5.

⁵⁶*Ibid*.

investigate cases where he suspects illegality, whereas the *qāḍī* can proceed only where there is a complaint.⁵⁷ He has, further, a measure of secular authority and has the right to use force in pursuance of his duty and to inflict punishment. In these respects, the *ḥisbah* resembles the *mazālim*, but it differs from it because it is not competent to hear cases outside the jurisdiction of a *qāḍī*.⁵⁸

Apart from the *muḥtasib* officials appointed by the government, there has been private individuals who want to carry out the role of *muḥtasib* on a voluntary basis.⁵⁹ There are differences between the two group, primarily because of the specific mandate given to the official *muḥtasib*. As such, he is compelled by his office to act and not to undertake other duties. He is authorized to summon offenders to appear before him and must act when called upon by a complainant. He may appoint assistants, inflict punishment and is entitled to draw emoluments for his services and more importantly, he is considered competent to exercise *ijtihād* in deciding cases involving *ʿurf*.⁶⁰

In his comprehensive study on the economic concepts of Ibn Taimiyyah, ʿAbd al-ʿAzīm Iṣlāḥī pointed out the important role of *ḥisbah* to promote high morality and competence in matters concerning law, the market and manufacturing.⁶¹ Through *ḥisbah*, the government can exercised a comprehensive socio-economic control on trade and economic practices. It can serve as supervisors to

⁵⁷ Another expression used is “when there is a claim” or “when a litigation is instituted”. See Chapter IV on Methods and Procedure, *supra*.

⁵⁸ *Ibid*.

⁵⁹ This aspect is highlighted on purpose to show that the role of what known as public-interest group in contemporary consumer protection has existed in Islām. This resembles in some respects consumer associations. Cf. Ian Ramsay, *Consumer Protection : Text and Materials*, p.83.

⁶⁰ *Ibid*. See R.P. Buckley, *op.cit.*, p.67.

⁶¹ Nichola Ziadeh, *op.cit.*, p.34, 55.

industry, professional services, standardisation of products, check on hoarding, middlemen and usurious practices, apart from his main function of looking after people's social behaviour, performance of religious duties and municipal works.⁶²

As regards economic functions, the *muhtasib* is responsible for supply and provision of necessities. He had to keep a check on the availability of essential goods like foodstuffs and services like construction, cultivation, cloth manufacturing and others. In industry, the *muhtasib*'s main duty was standardization of products. He was also authorized to ban harmful industries. For instance, if a chemist produced deceitful and unsound goods, the *muhtasib* should act against him. He could also resolve industrial disputes arising between employers and employees and if necessary, fix the minimum wages.⁶³

He was also responsible for monitoring the professional services rendered in the society. Deception is perhaps easier in the case of services than goods. The *muhtasib* was authorized to check whether physicians, surgeons, pharmacologists, engineers, architects and others were doing their jobs properly or otherwise. In the same way, teachers, grinders, inn-keepers and others were also regularly inspected.⁶⁴ As far as markets are concerned, the *muhtasib* had to supervise the market in general and different trade practices in particular. He had to check weights and measures and product quality to ensure that the merchants and their agents did not resort to practices calculated to deceive the consumers about merchandise and the prices charged for it. He also made sure that the merchants did

⁶²Abd al-ʿAzīm Iṣlāhī, op.cit., p.189.

⁶³Ibn Taimiyah, *al-Hisbah*, p.34.

⁶⁴Nichola Ziadeh, op.cit, p.118-121.

not indulge in any operation which was connected with the prohibited practices of interest and other usurious transactions.⁶⁵

5.4 Arbitration

Arbitration is often either overlooked in manuals of Islamic law or treated cursorily, usually in a chapter related to administration of justice (*qaḍā'*). Arbitration is generally described as a permissible substitute for the jurisdiction of an ordinary judge (*qāḍī*).⁶⁶ Among other systematic definitions found is that given by the *Majallat al-Aḥkām al-ʿAdliyyah* in which arbitration is defined as: "voluntary submission by two litigating parties of their disputes and claims to determination by a qualified person".⁶⁷ Samir Salih suggested that a definition by a contemporary scholar of Islamic Law, Muḥammad Salām Madkūr is the most comprehensive, in which arbitration is said as: "The submission by two or more contracting parties to a third party of a dispute to be adjudicated according to *Shariʿah*."⁶⁸

Arbitration (*tahkīm*) is considered as a simple option to resolve a dispute. It is not really characterised by adversity but more by conciliation. The texts of Islamic law have described arbitration as the spontaneous and less improvised approach. The arbitrator known as *ḥakam* or *muḥakkim*, is in normal cases, an ordinary man but possessing all the qualifications of a *qāḍī*. The dispute is to be

⁶⁵Ibn Taimiyah, op.cit., pp.21-22 ; ʿAbd al-ʿAzīm Iṣlāḥī, op.cit., p.190.

⁶⁶*Arbitration*, p.20.

⁶⁷Article 1790.

⁶⁸Muḥammad Salām Madkūr, *al-Qaḍā'*, p.131 cited in *Arbitration*, Ibid.

determined according to the *Shari'ah* both in procedure and substance, regardless of whether the case in dispute is extra-judicial or already pending in court.⁶⁹

The Ḥanafīs are seen to be more receptive to arbitration compared to other schools of law. They ruled that arbitration is valid in all cases which do not involve legally fixed punishment (*ḥudūd*), although whether *qiṣāṣ* can be the subject of arbitration remains a disputed matter. Arbitration is encouraged in marriage, divorce, sale, loan and guarantee contracts.⁷⁰ The Majallah permits the use of arbitration in financial matters involving private rights (*ḥuqūq al-nās*) wherein agency and representation is approved unlike in cases involving public rights where no proxy is allowed.⁷¹ All three other leading Sunni schools allowed arbitration in financial matters as well as in the discretionary punishments (*ta'zīr*).⁷²

Except in the opinion of a dissenting minority of the Shāfi'ī jurists⁷³, the award when issued by the arbitrators has the same binding and enforceable effect as a *qāḍī*'s judgement. Certain Ḥanafī authors have denied that the award is binding and enforceable before its confirmation by the *qāḍī*. However, most Ḥanafī authors as reflected in the Majallah confer a binding and enforceable effect on the award before any confirmation by the *qāḍī*.⁷⁴ 'Ali Ḥaydar favours the *qāḍī*'s confirmation for the reason that if and when the confirmation is granted by the *qāḍī*,

⁶⁹ *Arbitration*, p.20-21.

⁷⁰ The evidence for such a practice is based on verse 9 of al-Ḥujurāt [49]: "If two parties among the believers fall into a quarell, make ye peace between them...". See also *Hedaya*, p.243; *Mu'īn*, p.24.

⁷¹ *Maj. 'Adliyyah*, art.1841. See *Arbitration*, p.47.

⁷² *Mukhtaṣar*, p.438; *Tabṣīrat*, p.43; *Wajīz*, p.238; *Minhāj*, p.366; *Mughnī*, p.108. For modern treatment see M.S. el-'Awa, *Punishment in Islamic Law : A Comparative Study*, 1982.

⁷³ Ibn Abi al-Damm mentions the opinions of some Shafī'ī scholars who require the parties to arbitration to give their agreement so that the award becomes valid and enforceable. See *Adab al-Qadā'*, pp.139-141.

⁷⁴ *Mu'īn*, p.24; *Maj. 'Adliyyah*, arts.1842, 1848 and 1849.

the award will then become protected from challenge on the ground that the award does not conform to the doctrine of another *qāḍī*.⁷⁵

5.5 Amicable Settlement (Ṣulḥ)

Apart from arbitration, there is another method of settlement of dispute which is much faster and less adversarial. This method is known as *ṣulḥ* or amicable settlement between the parties involved. Literally, *ṣulḥ* means reconciliation, discontinuation or stoppage of the dispute or dissension and contention.⁷⁶ Legally, *ṣulḥ* is a contract to terminate or to avert a dispute of a lawsuit between two litigants.⁷⁷ Unlike arbitration where a third party is appointed to adjudicate, the two contracting parties in *ṣulḥ* are peacemakers or conciliators (*muṣāliḥ*).⁷⁸ The litigated right or the case at issue is the right to be settled (*muṣāliḥ ʿanh*), involving private claims like *ḍamān*. To arrive at a conclusion would involve mutual settlement enshrined in the willingness to give *badal al-ṣulḥ*.⁷⁹

The contract of *ṣulḥ* is not only a scheme for the elimination of dispute but also as a mean to amend an existing obligation. For instance, a creditor may waive

⁷⁵Durar, p.879.

⁷⁶Lexicon, II, p.175.

⁷⁷Evidence for the legality of such a method is founded on the basis of the reconciliation of marital relationship in al-Mā'idah [4] : 127 reads: "If a wife fears cruelty or desertion on the part of her husband, there is no blame if they arrange an amicable settlement between themselves and such settlement is best [*wa ʿl-ṣulḥ khayr*]." See Heffening, "Ṣulḥ," *EI(I)*, vol.IV, p.541; See also Sales, pp.478-479.

⁷⁸Article 1531 of *Maj.ʿAdliyyah* reads : A settlement is a contract concluded by offer and acceptance and consists of settling a dispute by mutual consent [*al-ṣulḥ ʿaqdun yurfaʿu ʿl-nizāʿ bi ʿl-tarāḍi wa yanʿaqid bi ʿl-ijāb wa ʿl-qābūl*]. See *Sh.Bāz*, p.827.

⁷⁹Introduction, p.148. Also see Sales, p.476.

his original claim.⁸⁰ This is what is called by Shāfi'ī as *ṣulḥ ibrā'* (reconciliation performed by release)⁸¹ wherein the element of benevolent gift is dominant. The other type is *ṣulḥ mu'āwadah* (reconciliation requiring a return) wherein a consideration is expected. He equated *ṣulḥ* to the contract of sale in the sense of its application to any permissible acts or otherwise.⁸²

Ṣulḥ can be accomplished by way of admission (*iqrār*) of the defendant, by way of his denial (*inkār*) and his silence (*sukūt*) consequent upon the absence of any admission or denial.⁸³ A person may appoint any other person as his agent to settle an action and when the agent makes a settlement, the principal is bound by such settlement. The agent is in no way responsible for any claim in connection therewith, unless he made himself a guarantor thereof, in which case he is liable.⁸⁴ Once a settlement is accomplished, neither of the parties may retract therefrom.⁸⁵ By agreeing to the settlement, the plaintiff becomes entitled to the consideration for

⁸⁰Article 1552 reads : If any person affects a settlement with any person in respect to a portion of a claim that he has against such person, the person affecting the settlement is considered to have received payment of part of the claim and to have forgone his right to the balance, that is to say, to have released such person from the remainder. Article 1553 reads : If any person effects a settlement whereby a debt repayable instantly (*dayn al-mu'ajjal*) is converted into a debt repayable at some future date (*mu'ajjal*), he is considered to have relinquished his right to instant payment. See *Civil*, p.406.

⁸¹*Ibrā'* consists of two parts : the first part consists of release by way of renunciation of a right [*ibrā' isqāt*], the second consists of release by admission of payment [*ibrā' istiḥā'*]. A special release [*ibrā' khāṣṣ*] is a release of a person from an action instituted in respect of a claim relating to some particular matter. A general release [*ibrā' 'amm*] is a release of a person from all actions. See *Maj. 'Adliyyah*, arts.1536-1538.

⁸²*Umm*, vol.III, p.226.

⁸³Detailed discussions can be found in al-Kāsānī, *Badā'i'*, vol.VI, p.40. Also see *Maj. 'Adliyyah*, art.1535.

⁸⁴See *Maj. 'Adliyyah*, art.1543. For illustration on the *modus operandi* of *ṣulḥ* see articles 1548-1555.

⁸⁵Article 1556 reads : [*idhā tamma al-ṣulḥ fa laysa li waḥidin min al-farīqayn al-rujū' 'anh*]. Salīm Bāz has enumerated a few exceptional situations to this general rules, citing various Ḥanafī authorities. [1] *Ṣulḥ* with property wherein later it was found that there is no obligation on the defendant.[2] Loss of the transported merchandise by *ajr mushtarak*, *ṣulḥ* is agreed but later the merchandise was found.[3] When the defect of the good was contended and *ṣulḥ* was reached but later its non-existence or disappearance was realized. See *Sh. Bāz*, p.845.

the settlement. He no longer possesses any right to bring an action. The defendant may not claim the return of the consideration for the settlement from him.⁸⁶

5.6 Insurance [Ta'mīn].

An insurance contract is undoubtedly a recent phenomenon in Islamic societies despite the fact that in some respects it bears similarities with various types of established transactions. Some scholars have suggested that as a result of extensive trading activities with the West, this idea and institution was known among Muslims.⁸⁷ However, this idea was developed in the 18th century and it was only in 20th century, that the term *ta'mīn* was adopted. Earlier, the term *sukara* (security or securitē) was more popular alongwith the Italian term *siguare* and Turkish *sigorta*. However, it is hard to conceive that Muslims did not practice insurance in very much earlier time as they were involved in marine activities in the Mediterranean and Indian ocean as early as the seventh century.⁸⁸

A recent finding on the conduct of Islamic maritime law which touches marine insurance⁸⁹ has suggested that insurance was practised though not known by such a designation and structure.⁹⁰ It was suggested that the Arabs were familiar

⁸⁶Civil, p.407.

⁸⁷E.Klingmuller, "The Concept and Development of Insurance in Islamic Countries," *IC XLIII* [Jan.1969], pp.27-37.

⁸⁸G.F.Hourani, *Arab Seafaring in the Indian Ocean in Ancient and early Medieval Time*, p.66.

⁸⁹*Maritime*, p.188.

⁹⁰Islamic law recognizes several transactions and institutions which function in a similar way to certain types of insurance. [1] Contract of *ḍamān* [guarantee] [2] *Ḍamān khaṭar al-ṭariq* [guarantee against travel hazard] [3] *Walā' al-muwālāt* (transfer of clientage) [4] *Diyah* [blood money] [5] *Muḍārabah* [dormant partnership] [6] *Zakāt* [7] *Waqf* (charitable endowment) [8] *Jizyah* (Poll Tax). See Muṣṭafā Zarqā', *Ta'mīn*, p.12.

with marine insurance as recorded in their famous dictum: "Sustenance through trade on sea" [*al-rizq bi 'l-tijārah fī 'l-baḥr*].⁹¹ In the field of maritime commerce, risk of loss has always been the primary concern of both merchants and mariners. To protect against risk and thereby minimise loss and risk by sharing loss, the contract of insurance was adopted as a form of mutual assistance (*takāful*).

The research further suggested that this type of mutual assistance might have its nucleus in the commercial life in Arabia. Hourani testified that the rigorous practice of seafaring and trading among the Arabs would have been a possible reason for adopting such a measure.⁹² The purpose of such insurance is two fold, namely, security against risk and indemnity for loss. The term insurance signifies the notion of 'making sure' parallel to the French '*sure*' and the Latin '*securus*', employed by notaries and merchants in the early Middle Ages to describe a contract of security against risk in maritime trade.

The ever growing complexity of the economic system in the industrial age has increased the importance of risk management, that is reduction and removal of risks, in the productive process and commercial transactions. If the risk of loss in business by shipwreck, air crash, theft, natural catastrophe like floods and the like.

⁹¹Roberts, *The Social Laws of the Qur'ān*, p.99. See *Maritime*, p.187. This aspect has its origin in the Qur'ān XVI : 14 which reads : It is He Who has made the sea subject that ye may eat extract thereof flesh that is fresh and tender and that ye may extract thereof ornaments to wear and thou seest the ship therein that plough the waves that ye may seek [thus] of the bounty of God and that ye may be grateful.

⁹²Afzalur Rahman seem to denote that the merchants of Makkah used to form a mutual fund to help the victims and survivors of natural hazards during their commercial ventures to Syria, Iraq and other places. See Afzalur Rahman, *Banking and Insurance*, p.34. See also Vardit Rispler-Chaim, "Insurance and Semi-Insurance Transactions in Islamic History Until the 19th Century," *JESHO* XXXIV [1982], pp.142-158.

By meeting pure risk through insurance, the investor will be facing only normal business risk and uncertainties, which are inevitable in all investment.⁹³

a] Debate on Insurance Among Contemporary Scholars

There has been a mixed reaction towards the contract of insurance among Muslim scholars. There are at least three standpoints; absolutely prohibited (*ḥarām*), absolutely permissible (*mubāḥ*) and allowing some forms of insurance but disapproving of others.⁹⁴

The proponents of the prohibition of insurance argued that their objection to it is that it has the elements of *ribā* (usury), *gharar* (risk), *juhala* (uncertainty), *maysir* (gambling and unearned gain), attempting to supersede the will of God, all of which is said to be diametrically opposed to the ethical standards set by Islamic law.⁹⁵ This group also argued that the application of *ḍamān* in insurance is not an obligation founded on sound *Sharīʿah* sources. At the same time, it contains the prohibited elements mentioned earlier and there is no real reason to have an alternative of such contract.⁹⁶ The insurance contract is alleged to be “exploiting the people’s anxiety of their uncertain future”.⁹⁷

⁹³M.N.Siddiqi, *Insurance in an Islamic Economy*, p.23.

⁹⁴Aḥmad al-Saʿīd Sharaf al-Dīn, *ʿUqūd al-Taʾmīn wa ʿUqūd Ḍamān al-Istithmār*, p.88-94 ; M.Muslehuddin, *Insurance and Islamic Law*, p.109-125. For details on the polemic between Shaykh Muḥammad Abū Zahrah and Shaykh Muṣṭafā Aḥmad Zarqāʾ see Zarqāʾ’s works *ʿAqd al-Taʾmīn [al-sukrah] wa Mawqif al-Sharīʿah al-Islāmiyyah minhu* [A lecture delivered during the Usbūʿ al-Fiqh al-Islāmiyy], Damascus, 1962 and a recent work *ʿAqd al-Taʾmīn fī al-Sharīʿah al-Islāmiyyah*, 1982.

⁹⁵M.Muslehuddin, op.cit., p.109. See also Nik Ramlah N.Mahmood, “Takāful :The Islamic System of Mutual Insurance - The Malaysian Insurance,” *ALQ* [1991], pp.280-296.

⁹⁶A.S.Sharaf al-Dīn, op.cit., p.88.

⁹⁷A.S.Sharaf al-Dīn quoting the saying of Muḥammad al-Ghazālī in his *al-Islām wa ʿl-Manāḥij al-Ishṭirākiyyah* that *taʾmīn* is nothing but [*istighlālān li tahayyub al-nās min ghaddihim al-mubham*].

Muḥammad Abū Zahrah has made the qualification that *ta'mīn* not founded on a collective basis (*al-ta'mīn ghayr al-ta'āwunī*) is reprehensible (*makrūh*). Such a decision is established on the basis of the classical methodology of 'ulamā' *al-salaf* that no prohibition will be pronounced except where there is an explicit evidence (*dalīl qaṭ'ī*). The 1976 First International Conference on Islamic Economics held in Makkah resolved that : "The Conference feels that commercial insurance (*ta'mīn tijārī*) as currently practised does not realise the *Sharī'ah* aims of cooperation and solidarity because it does not satisfy the required conditions therefor".⁹⁸

The proponents of the permissibility of *ta'mīn* declared that such a contract is allowed when it is free from *ribā*. It is considered as a collective undertaking (*'amal ta'āwunī*) which takes care of the welfare (*maṣāliḥ*) of individuals and society. In so far as *maṣlahah* is achieved, it is in compliance with the law. Furthermore, originally all contracts are permissible (*al-aṣl fī 'l-ʿuqūd al-ibāḥah*) and as such it can be equated by analogy to various permissible contracts (*'uqūd jā'izah*).⁹⁹ Justification based on public interest and even on the socio-economic survival of the Muslim ummah has also been put forward.¹⁰⁰

⁹⁸First International Conference on Islamic Economics, Makkah, 1976 [General Recommendations No.6]. See Muḥammad Nejatullah Siddiqi, "Muslim Economic Thinking : A Survey of Contemporary Literature," in *Studies in Islamic Economics* edited by Khurshid Ahmad, 1976, p.217. On that premise, the Conference has also recommended formation of a committee consisting of specialists in *Sharī'ah* and Economics to recommend a system of insurance which is free from *ribā* and speculation, promotes cooperation in accordance with the *Sharī'ah* and helps replace the current form of commercial insurance. M.N.Siddiqi, *ibid.* See also proceeding of the Islamic Fiqh Academy discussing on insurance in *Qarārāt Majlis al-Majma' al-Fiqhī al-Islāmī* [19 January 1985], pp.43-52.

⁹⁹A.S.Sharaf al-Dīn, *op.cit.*, p.90.

¹⁰⁰See Muḥammad al-Bahī, *Aqd al-Ta'mīn*, p.23 ; Faraj al-Sanhūrī, *al-Ta'mīnāt*, p.175.

The justifications of *ta'mīn* advanced by Muṣṭafā Zarqā'¹⁰¹ and 'Alī al-Khafīf¹⁰², leading contemporary scholars, have been overwhelmingly accepted. Firstly, it was argued that *ta'mīn* is a newly known contract not covered by any text (*naṣṣ*) whether approving or disapproving of it. It should be then allowed (*jā'iz*) and permissible (*mubāḥ*). Secondly, since it is a contract based on *maṣlaḥah* and since there is no aspect of any harm (*ḍarar*), it complies with the prescribed law. Thirdly, insurance has become a common usage (*'urf 'āmm*) necessary for the attainment of private and public interests. *'Urf* is argued to be a source of law, so far as it does not contradict the precepts of the *Sharī'ah*.¹⁰³

The contracting parties are given freedom to choose the legal techniques to be adopted in order to achieve the intended deal, so long as the conditions are valid in terms of Islamic law. *Ta'mīn* is argued to fall under the generic basis of two dominant maxims, (i) obligation to fulfill contractual undertakings [*awfū bi 'l-'uqūd*]; and (ii) legitimacy of trading with mutual consent [*illā an takūna tijāratan 'an ṭarāḍin minkum*]. Islamic law grants mankind freedom to create any contract which they need within the fringe of the general rules when there is no text prohibiting it as well as when it does not defy any religious precepts.¹⁰⁴

The third group ruled that some forms of *ta'mīn* are allowed and some are prohibited. Some of them allowed the use of *ta'mīn* on property but banned life insurance. Some also allowed it on a restricted basis, only to undertake

¹⁰¹His finding on this matter was delivered in the *Uṣbū' al-Fiqh al-Islāmī* in Damascus [1961] as well as in his deliberation at the Makkah Conference [1976].

¹⁰²His opinions submitted to the Second Assembly of the Majma' al-Buḥūth al-Islāmiyyah [Islamic Research Academy] of al-Azhar University in which he excluded life insurance from the list of validated insurances.

¹⁰³A.S.Sharaf al-Dīn, op.cit., p.90.

¹⁰⁴Ibid., p.98.

responsibility corresponding to the contract of clientage (*‘aqd al-muwālāh*).¹⁰⁵ There are also certain scholars who determine the legality of *ta’mīn* based on the nature of the risk (*khaṭar*) involved. *Ta’mīn* is allowed only if the risk is actuated by human act whereas in a case involving natural misfortune, using *ta’mīn* as a security is deemed to be a form of speculation and gambling.¹⁰⁶

b] Ta’mīn and the grounds for ḍamān.

Since it has been alleged that *ta’mīn* is established on the basis of guarantee (*ḍamān*) which is provided for the consequence of the risk suffered by the guaranteed person who has been given the guarantee by the guarantor, it is pertinent to see whether *ta’mīn* falls under any of the legal grounds for *ḍamān*. The jurists have enumerated a number of grounds of *ḍamān* which include, among others, transgression that is ruination whether directly or causative (*ta‘addī - al-iltāf mubāsharatan aw tasabbuban*), fraud (*taghrīr*), unentrusted possession of property (*wad‘ al-yadd ghayr al-mu’taminah*) and suretyship (*kafālah*). Muḥammad Bakhīt al-Muṭī viewed that *ta’mīn* does not fall under any of these grounds and therefore should be seen as “an obligation which is not required by the law”.¹⁰⁷ Another proponent of *ta’mīn* has suggested that such a practice of paying compensation to the insured by virtue of the loss suffered while the insurer has no role whatsoever in that respect, has no good reasons according to the *Sharī‘ah*.¹⁰⁸

¹⁰⁵See Faraj al-Sanhūrī, op.cit., 168.

¹⁰⁶Fatwā of Najm al-Dīn al-Wā‘iz, the Muftī of ‘Irāq cited in Faraj al-Sanhūrī, p.185.

¹⁰⁷He voiced it as [*‘aqd ilzām li mā lā yulzam shar‘an*] similar to the one said by Ibn ‘Ābidīn [*iltizām bi mā lā yulzam shar‘an*]. See A.S.Sharaf al-Dīn, op.cit., p.100.

¹⁰⁸Shaykh ‘Abd al-Raḥmān Tāj said that such has justification in the Sharī‘ah and contradicts the law as it is susceptible to deceit (*ghubn*), injustice (*ḥiyāf*) and taking people’s property illegally (*akl amwāl al-nās bi ‘l-bāṭil*). See his *Sharikāt al-Ta’mīn min wijhat nazar al-Sharī‘ah al-Islāmiyyah* [discussion paper at the seventh assembly of the Majma‘ al-Buḥūth al-Islāmiyyah].

On the contrary, it was argued that restriction (*ḥaṣr*) should not be imposed while determining grounds of *ḍamān*. After all, there is no decisive text on the issue and thus it is still subject to deliberation. *Ḍamān* can still be applied in cases involving entrusted possession of property like in *taḍmīn al-ṣunnā* (civil liability of the craftsman).¹⁰⁹ In reality, every contract regardless of its characteristic, is considered a ground of *ḍamān* by most jurists.¹¹⁰ For instance, the contract of clientage (*‘aqd al-walā’*) brings about a guarantee by an Arab for the wrong committed by his non-Arab Muslim client.¹¹¹

It was also pointed out that a contract of settlement on one property for another property (*al-ṣulh ‘alā māl bi māl*)¹¹² works on the same basis. Therefore, it appears that contractual guarantee (*ḍamān ‘aqdī*) can become a legally viable mechanism for *ta’mīn*, regardless of the occurrence of any transgression (*ta‘addī*) or negligence (*taqṣīr*) or both.¹¹³ Based on this argument, *ta’mīn* is considered as a lawful contract after the notion of *ḍamān ‘aqdī* has been widened, with a condition that it is free from any prohibited elements like *gharar*, *ribā* and the like.¹¹⁴

Even if the question of legal mechanism may seem to be resolved in favour of some form of *ta’mīn*, there are still a number of important questions to be clarified. Can *ḍamān* be applied when the risk is unknown and uncertain?. ‘Alī al-Khafīf and Muṣṭafā Zarqā’ clarified that *ḍamān al-majhūl* when based on the

¹⁰⁹ *Naz. Ḍamān*, p.67 ; ‘Abd al-Nāṣir al-‘Aṭṭār, "Ḥukm al-Ta’mīn fī al-Sharī‘ah al-Islāmiyyah," *Majallat ‘Ulūm al-Qānūniyyah wa ‘l-Iqtisād*.

¹¹⁰ *Naz. Ḍamān*, p.65, 144.

¹¹¹ A.N.al-‘Aṭṭār, *ibid*.

¹¹² *Naz. Ḍamān*, p.152.

¹¹³ *Naz. Ḍamān*, p.67.

¹¹⁴ A.N.al-‘Aṭṭār, *op.cit.*, 37, 61.

prevailing risk is permissible. They apply an analogy to *kafālah* in which rights will be established afterwards. It is also similar to *kafālah bi 'l-ju'l* (guarantee to give reward) where reward will be honoured after performance of the task. Therefore, the application of *ḍamān* in the sense of undertaking the consequence of the risk (*taḥammul al-tabi'ah*) does not require its actual presence. It is sufficient that it should only be presumed to exist (*muḥtamal al-wujūd*). Ignorance about the amount of debt in *kafālah* does not invalidate such dealings as "the type of *jahālah* which is forbidden is the one that inhibits fulfillment of the obligation". Thus ignorance of the amount of compensation (*jahālat miqdār al-ta'wīḍ*) does not affect *ta'mīn* in any way.

In practice, the concept of mutual insurance (*takāful*) can be seen as a method of joint guarantee among a group of members or participants against loss or damage that may be inflicted upon any of them. The members of the group agree to guarantee jointly that should any of them suffer a catastrophe or disaster he would receive a certain amount of money to help him meet the loss or damage. It means mutual help among the members by pooling efforts to support the needy.¹¹⁵ *Takāful* has been developed as a form of business. Its business venture is based on the principles of Islamic transactions, particularly the contract of *muḍārabah*.

"Under the contract of *takāful* based on the principle of *muḍārabah*, the entrepreneur or the *takāful* operator (*muḍārib*) will accept payment of *takāful* instalments or contributions termed as *ra's al-māl* from the investors or provider of capital [*takāful* participants] acting as *ṣāhib al-māl*. The contract specifies how the profit which is the surplus from the operations of *takāful* managed by the *takāful* operators is to be shared, in accordance with the principles of

¹¹⁵M.Fadzli Yusof, "Takāful - Islamic Alternative to Insurance," Paper presented at the Law Seminar of the Kulliyah of Laws, International Islamic University, Malaysia, 26-27th July 1986, p.4.

mudārabah. The sharing of such profit may be in a ratio of 5:5, 6:4, 7:3 etc. as agreed between the contracting parties."¹¹⁶

In addition to that, the manner in which the *takāful* contributions are to be invested will be spelt out clearly in the contract. The general terms and conditions include benefits which the participants are entitled to, as well as rights and obligations of both the participants and the *takāful* operator. Another equally important feature of the *takāful* contract is the Islamic concept of *tabarruʿ*. Under this arrangement, the participants agree to relinquish as donations made in accordance with the concept of *tabarruʿ*, certain proportion of their *takāful* instalments in order to fulfil the obligations of mutual help as embodied in the concept of *takāful*. The purpose of *tabarruʿ* as stipulated in the contract is to enable the participants to perform their deeds in helping fellow participants who might suffer loss or damage due to a catastrophe or disaster.¹¹⁷

This present work inclined to support Zarqā's standpoint on insurance. The matter has become a routine in businesses and thus an Islamic alternative need to be worked out. As long as there is no transgression against the precepts and the spirit of the *Sharīʿah* such an important institution is needed. What is equally important is the amount of research done in order to identify the weaknesses in the operation of *takāful* and building a comprehensive body of principles based on sound Islamic legal rules.

5.7 Banking and Financial House (Maṣārif)

¹¹⁶Ibid., pp.4-5.

¹¹⁷Ibid, p.5.

Literally, *ṣarf* in relation to property means turning, sending and employing. *Muṣārafah* thus signifies the act of dealing, buying and selling and it is sometimes attributed to exchanging money.¹¹⁸ *Maṣārif* is the technical term used to denote financial houses or banking institution.¹¹⁹ It is an important financial intermediary and vital institution in the economic structure of any society. It mobilises savings and idle funds in an economy and makes them available to those who can make better and fuller use of them. In this way, banking effects a reallocation of the capital funds. Beside this main function, the banking system makes possible a most convenient method of payment through chequing facilities and renders many other subsidiary services.¹²⁰

a] The Operation of Islamic Banks based on Mu‘āmalāt

Islamic banking is founded on the basis of a sound Islamic economic philosophy. It evolves on seven key concepts, founded on the broad terms of various divine prescriptions in the Qur’ān. Firstly, the economic principle of an Islamic bank should be based on the concept of God’s ultimate ownership of prop-

¹¹⁸E.W.Lane, *Lexicon*, pp.1680-1681.

¹¹⁹The *ṣarrāf* or money changer became an essential feature of every Muslim market. A bank with headquarters in Baghdād and branches in other cities was mentioned in Arabic sources. They carried on business through an elaborate system of cheques and letters of credit etc. which was so developed that it was possible to draw a cheque in Baghdād and cash it in Morroco. Indeed it was reported that in Baṣrah, the centre of trade with the East, where each merchant had his own bank account, payment were effected in cheques and never in cash. It may be significant to mention that the word cheque is derived from the Arabic word *ṣakk*. See Hassan and Hill, *Islamic Technology*, p.18.

¹²⁰Muḥammad Uzair, "Some Conceptual and Practical Aspects of Interest-Free Banking," in *Studies in Islamic Economics* edited by Khurshid Ahmad, p.37 ; Mohsin Khan and Abbas Mirakhor, "The Framework and Practice of Islamic Banking," *Finance and Development* [Sept.1986], pp.32-36.

erty.¹²¹ Secondly, mankind is seen as the vicegerent of God on earth with the dual responsibility of worshiping God by submitting to His commandments and managing the worldly affairs by deploying God's bounties according to that scheme.¹²² In this context, wealth is given to mankind as a trust (*amānah*) as they are subject to God's rules and hold the property for a limited timespan, during their lifetime.

Thirdly, emphasis is placed on the integration of ethical values in economic activities as Islām is perceived as a comprehensive way of life encompassing every aspect.¹²³ Fourthly, it advocated positive attitude towards rigorous economic activities and development. As God has prescribed a set of rules on economic matters, the wealth entrusted to mankind need to be managed accordingly and should be invested in a productive and beneficial way. Hoarding of property in any manner is strictly prohibited as that will impede economic growth, causing monopoly and manipulation and all kind of injustices.¹²⁴ Similarly, the *Sharī'ah* also speaks about striking the balance between consumption and saving for investment.¹²⁵

¹²¹Q., al-Mā'idah [5] : 17 reads : "...For to Allāh belonh the dominion of the heavens and the earth and all that is between..." Also see al-Mā'idah [5] :18 ; Ṭahā [20] : 6 ; al-Baqarah [2] : 284 ; Āli 'Imrān [3] : 26 ; Yāsīn [36] : 83.

¹²²Q., al-Baqarah [2] : 30 reads : Behold, thy Lord said to the angels : "I will create a vicegerent on earth. More clearly terms al-Ḥadīd [57] :7 reads :Believe in Allāh and His Messenger and spend [according to the Sharī'ah] out of the [substance] whereof He has made you heirs. For those of you who believe and spend [in that manner] for them is a great reward. Also see al-A'rāf [7] :129 ; al-An'ām [6]:133 ; al-Nūr [24] : 55.

¹²³Q., al-A'rāf [7] : 96 reads : If the people of the towns had but believed and feared Allāh , We should indeed have opened out to them [all kinds of] blessings from heaven and earth ; but they rejected the truth and We brought them to book for their misdeeds. Also see Ṭahā [20] : 123-124 ; al-Tawbah [9] : 105.

¹²⁴Q., al-Tawbah [9] : 34 reads :....And they are those who bury gold and silver and spend it not in the way of Allāh, announce unto them a most grievous penalty..

¹²⁵Q., al-Isrā' [17] : 27 reads : Verily spendthrifts are brothers of the evil ones and the evil ones is to his Lord (himself) ungrateful. Further, in al-Furqān [25] : 67 God ruled : Those who, when they spend, are not extravagant and not stingy but hold a just [balance] between those extremes. See also al-Isrā' [17] : 29 ; al-Nisā' [4] : 5 ; al-Jumu'ah [62] : 10.

The fifth concept is related to the question of redistribution of wealth based on social orientation. The mechanism used is the institution of *zakāt*, by which wealth is shifted from the rich to the poor.¹²⁶ The sixth concept, an important landmark of Islamic banking, is eradication of *ribā*.¹²⁷ As an alternative, the seventh concept emphasizes the importance of profit-sharing, using the contract of *muḍārabah* (trustee profit-sharing) and *mushārah* (joint-venture profit-sharing).¹²⁸

In practice, it was suggested that banking activities in the medieval Islamic world were quite extensive despite the fact that there is no autonomous or semi-autonomous institution whose primary concern was dealing with money as a specialized pursuit. This is quite contrary to the situation of banking in medieval Europe epitomised in the proposition “there can be no banking without a bank”. Such constituent elements of banking as deposits, credit and bills of exchange were quite differently construed within the medieval Islamic setting compared to that in European banks. Banks do not make their appearance in the Islamic Middle East until comparatively recently. This is partially due to economic and political contact with premodern Europe.¹²⁹

¹²⁶*Q.*, al-Tawbah [9] :103 speaks about the objectives of *zakāt* : Of their wealth take alms that so thou mightest purify and sanctify them. al-Dhāriyāt [51] : 19 explains : And in their wealth and possession [was remembered] the right of the [needy], him who asked and him who [for some reason] was prevented [from asking]. See also al-Tawbah [9] : 60 ; al-Isrā’ [17] : 26 ; al-Baqarah [2] : 177, 195.

¹²⁷*Q.*, al-Baqarah [2] : 278-279 reads : O ye who believe fear Allāh and give up what remains of your demand for usury, if ye are indeed believers. If ye do it not, take notice of war from Allāh and His Messenger. But if ye turn back, ye shall have your capital sums. Deal not unjustly and ye shall not be dealt unjustly. See also al-Baqarah [2] :275.

¹²⁸Sobri Salamon, *Bank Islam* [in Malay], pp.1-19.

¹²⁹A.I.Udovitch, “Bankers Without Banks : Commerce, Banking and Society in the Islamic World of the Middle Age,” in *The Dawn of Modern Banking* edited by Center for Medieval and Renaissance Studies, University of Claifornia, Los Angeles, pp.255-256.

As regards the application of *ḍamān*, it appears that it will predominantly be in the area of *kafālah* without denying the importance of *gharāmah*. As far as the Malaysian Islamic Bank [BIMB]¹³⁰ is concerned, it operates based on the Islamic *mu‘āmalāt* mechanisms. Firstly, the customers' deposits are accepted on the basis of current accounts, saving accounts and general investment accounts.¹³¹

A current account is a deposit from customers who are looking for safe custody of their funds and absolute convenience based on the principles of *wadī‘ah*. The bank requests permission from such customers to make use of their funds so long as these funds remain with the bank. The customers may withdraw a part or the whole of their balance at any time they so desire and the bank guarantees the refund of such balances. All profits generated by the bank from the use of such fund belongs to the bank.

The saving account works on the same basis except the bank has an absolute discretion to reward the customers by returning a portion of profits generated from

¹³⁰The Malaysian Islamic Bank was incorporated as a public companies under Companies Act 1965 on 1 March 1983. The Islamic Banking Act was enacted by Parliament and came into force on 10 March 1983. The Act seeks to provide for the licensing and regulation of Islamic Banking business. It was modelled on the Banking Act 1973 with modification and amendments as were necessary to conform with Islamic Banking operations and practices. See Nik Norzrul Thani, *Legal Aspects of the Regulatory Framework of the Malaysian Financial System*, Unpublished Ph.D thesis, London University, 1993, pp.293-294. Thani pointed out that the Islamic Banking Act does not set out the details of such commercial transactions allowed by the *Shari‘ah*, as it is only regulatory and does not provide any statement of the substantive law to be applied in cases of disputes. Furthermore, disputes as regards commercial matters are brought to the civil court not to the *Shari‘ah* court. The disputes then continue to be dealt with according to the principles of common law as evident in *Tinta Press Sdn Berhad v. Bank Islam Malaysia* [1987] 2 *MLJ* 192-195. See also T.Naughton and B.Shanmugam, "Interest-Free Banking: A Case Study of Malaysia," *National Westminster Bank Quarterly Review* [1990], pp.16-33.

¹³¹A.H.Ismail, "Bank Islam Malaysia Berhad : Principles and Operations," in S.G.S.Abod et.al, *Islamic Finance*, pp.272-282. Also see Mahsin Mansor, *Konsep Syariah Dalam Bank Islam* [The Shari‘ah Concepts of Islamic Banking], Kuala Lumpur : BIMB, 1983.

the use of their fund from time to time.¹³² Thus the bank's use of the money while it is held by it with the approval of the customer and satisfies the requirement in a *wadī'ah* contract where the holder of the deposit may use it with the permission of the depositor. Another difference is that saving account does not give chequing facilities. Despite this limitation, the customer will benefit from the profit generated from the said fund.

In the general investment account, the bank accepts deposit from its customers looking for investment opportunities based on *muḍārabah*. The deposit will have to be for a specified period. As a full-pledged operations, the bank intends to accept deposit from a period as short as one month to one of sixty months or even longer. In such a transaction, the bank acts as the entrepreneur and the customer as the capital provider and both have agreed on the distribution of profit. In the event of loss in the investment, the customers bears the loss. The customers does not participate in the management of the investment fund.¹³³

As regards to financing operations, BIMB participated in providing finance for its customers' projects or asset acquisition in various ways under extensive *mu'āmalāt* principles. Those various modes of financing are as follows :

- a. **Project Financing through *Muḍārabah*** - The bank will undertake to finance acceptable projects under trustee project financing. It works on the established *muḍārabah* rules.¹³⁴

¹³²Ibid., p.272;274.

¹³³Ibid., p.274.

¹³⁴The acceptability of this type of financing by the BIMB depends upon the ability of the contractor to perform his obligations and the ability of the contractee to pay the debt when it is due. Important aspects relating to security, credit analysis, various aspects of ability to generate income and financial appraisal are being carried out. Proper documentations of all instruments involved are prepared accordingly. Thereafter, disbursal of fund will follow suit and all this will be closely

b. **Project Financing through *Mushārah*** - The bank undertakes the financing of acceptable project under joint-venture project financing. It works on the established *mushārah* rules.

c. **Financing the Acquisition of Assets through *Bay' bi Thaman Ājil*** - The bank will finance its customers who wish to acquire a given asset for a specified period and to pay by instalments under the principle of deferred sale. The bank has to determine the customers' requirements, subsequently purchase the asset and then sell it to the customer at an agreed price which comprises the actual cost of the asset and bank's margin of profit.

d. **Financing the Use of Services of Assets through *Ijārah*** - The bank will finance its customers to acquire right to use the services of a given asset under a lease. The bank first purchases the asset required by the customers and subsequently leases the asset to the customer for a fixed period, lease rentals and other terms and conditions are agreed by both parties.

e. **Financing the Use of Services and Subsequent Acquisition of Assets through *Bay' Ta'jīrī*** - The bank will finance its customer who will initially wish to acquire the right to use the services of a given asset but subsequently to own the asset under the principle of leasing ending with ownership. It works the same way as *ijārah* except that both parties agreed at one point of time that the customer will buy from the bank the asset concerned

at an agreed price with all the previous lease rentals constituting part of the price.

f. **Discharge of Social Responsibilities known as *Qard al-Hasan*** - The bank may use an appropriate portion of the funds at its disposal for what may be considered as the discharge of social responsibilities through loans to deserving customers. This is known as benevolent loan. This loan may be granted to truly deserving customers for worthy economic projects with the underlying objective of support and assistance.¹³⁵

Apart from these operations, BIMB also provided specific facilities or financing mostly on short-term basis for the purpose of facilitating trade or working capital for its customers. These facilities may be granted in connection with the purchase, import and export of goods and machinery and the acquisition and holding of stock and inventories, spares and replacements, raw materials and semi-finished goods. These types of facilities are essentially founded on the extension of the *mu'amalat* rules on *ḍamān* and *kafālah*.¹³⁶

Among other facilities provided is letters of credit under *wakālah*. The customer will inform the bank his requirements and request the facility from the bank. The bank may require the customer to place a deposit to the full amount of the price of goods to be purchased or imported under the principle of *wadī'ah*. With all the requirements satisfied, the bank will proceed with issuing the letter of credit and pay the proceeds to the negotiating bank utilising the customers' deposit

¹³⁵Ibid., pp.275-277.

¹³⁶For general discussion see 'Alī Aḥmad al-Sālūs, *al-Mu'amalāt al-Māliyah al-Mu'āṣarah fī Ḍaw' al-Sharī'ah al-Islāmiyyah*, Kuwait : Maktabat al-Falāḥ, 1986.

and subsequently releasing the document to the customer. The bank charges the customer fees and commission for the services rendered.¹³⁷

A letter of credit under *mushārah* is a transaction wherein the customer notifies the bank of his requirements and negotiates the terms of *mushārah* financing subject to the procedure relevant to this principle. The customer places a deposit in the bank for his share of the cost of goods to be purchased as stipulated in the *mushārah* agreement based on *wadī'ah*. The bank then establishes the letter of credit and pays the proceed to the negotiating bank using the customers fund together with its own share of finance and subsequently releases the document to the customer.¹³⁸

A letter of credit can also be effected under *murābahah* by which the customer request the bank to purchase the goods indicating thereby that he would be willing to purchase the goods from the bank upon their arrival on the principle of cost-plus (*murābahah*). The bank establishes the letter of credit and pays the proceeds to the negotiating bank utilising its own funds. The bank then sells the goods to the customer at a sale price comprising its cost and a profit margin under *murābahah* for settlement by cash or on deferred terms.¹³⁹

The bank may also provide the facility of a letter of guarantee to its customers for certain purposes under the principle of *kafālah*. The letter of guarantee may be provided in respect of performance of a task, settlement of loan and the like. Customers may also ask for finance towards his working capital

¹³⁷A.H.Ismail, op.cit., p.278.

¹³⁸Ibid, pp.278-279.

¹³⁹Ibid., p.279.

requirement to purchase stock and inventories, spares and replacements, raw materials and others. It is done by the bank initial appointment of the customer as its agent to purchase the required goods on its behalf and it settles the purchase price from its fund. The goods are then sold to the customer on *murābaḥah*. There are some other subsidiary services offered by BIMB like remittance and transfers, sale and purchase of foreign currencies, sale of travellers' cheques, investment or portfolio management, trustee and nominee company services and others.

Conclusion

This chapter has demonstrated the way *ḍamān*, as wide concept, being applied in various institutions where it has been involved. Despite the various nature of the operations, it is a viable method of providing security whether in the sense of personal suretyship or in the sense of providing protection against problems arising from contractual relationships.

CHAPTER SIX.

DAMĀN IN CONTEMPORARY LEGISLATION.

“Looking to the future, there are two principal features of modernist legal activities which command attention. In the first place the current expression of the law rests upon the striking diversity of juristic criteria, which represent varying degrees of fusion between the two basic influences of practical necessity and religious principles.”
[N.J.Coulson, A History of Islamic Law, p.218.]

This chapter seek to survey the extent of the relevance of the classical principles of *damān* in the modern statute law in Muslim nations, providing a brief study on the trend of current laws in selected Middle Eastern countries. These countries have been particularly chosen in terms of their strong adherence to the principles of the *Shari‘ah*. It hoped to provide a broad idea of the law currently in operation and the intensity of the Islamic influence in the era known as “the reassertion of the *Shari‘ah*”.¹

At the outset, it is pertinent to discuss briefly the position of Islamic law in the twentieth century. During the nineteenth century the Ottoman Empire fell under the influence of European civilization and began to adopt a European legal system. This domination has resulted in the imposition of the occidental system on the Muslims being justified by the alleged irreconcilable conflict between the

¹ See W.M.Ballantyne, *Commercial Law in the Middle East : The Gulf States*, p.24.

orthodox legal doctrines and the desires of the Muslim community to receive European influence.²

Ian Edge asserted that the Middle Eastern countries have approached the problem of reforming civil and commercial laws which purportedly suit the need of modern industrial society. He surveyed the process of adoption of foreign civil and commercial laws by Middle Eastern countries and divided the development chronologically into four stages. These are the period of colonial rule from around 1850-1950, the post Second World War to 1970, the decade between 1970-1980 and 1980 to present.³ He pointed out that the third period has witnessed a rigorous intra-Arab borrowing which was more acceptable in reforming their civil and commercial laws due to religious and cultural factors. In the fourth period, there has been a considerable pressure in all states to Islamicise the laws and to use, to certain extent, European precedents which were amended to suit the need of a modern yet Islamic society.⁴

²This standpoint, advanced Kourides, is not viewed in light of the flexibility of Islamic jurisprudence in confronting the changing world but rather on a static given situation. Islamic law is not given a chance to prove its viability. Even if the Majallah as the sole survivor has been subject to various unnecessary attacks. At one point of time, leading scholars like Snouck Hurgronje and Schacht suggested that Islamic law has no future and has no place in the modern setup. Recent development has proven otherwise especially in the late 1980s. See N.Kourides, "The Influence of Islamic Law on Contemporary Middle Eastern Legal Systems : The Formation and Binding Force of Contracts," *Columbia Journal of Transnational Law* vol.IX [1970], p.384; Joseph Schacht, "Problem of Islamic Legislation," *SI* 13 (1960), pp.99-129. Also see W.M.Ballantyne, " The New Civil Code of the United Arab Emirates : A Further Reassertion of the Shari'a," *ALQ* vol.I [3] [1986], p.245.

³Ian Edge, " Comparative Commercial Law of Egypt and the Arabian Gulf," *Cleveland State Law Review* vol.34 [1985-86], pp.129-130.

⁴*Ibid.*, p.130. Ahmad Ibrahim said that in the Middle East, western influence on Muslim law and jurisprudence exerted itself through the medium of Islamic modernism. Modernism is aimed at adapting Islām to modern conditions by renovating those parts of its traditional equipment which are regarded as medieval and out of touch with modern times. The criticism is directed not against the concept of an Islamic law, the concept that Islām as a religion ought to regulate the sphere of law as well, but against the traditional form of Muslim jurisprudence and against the way in which Muslim scholars of the middle ages have applied the message of Islām in the sphere of law...Many of the modernists are lawyers by profession and it is the modernist jurists who prepared, provoked and guided the new legislation. See Ahmad Ibrahim, *Islamic Law in Malaya*, p.102.

More recently, new constitutions and constitutional amendment in several Muslim countries have proclaimed the *Sharī'ah* as the principal source of legislation. Concurrently, with the adoption of those provisions or closely following upon it, there has been an increasingly vocal demand that the existing law be abrogated in favour of an immediate return to the classical *Sharī'ah*. This challenge, according to Mursi Badr, need to be confronted with enlightened rationalism. The proponents of this school hold that the *Sharī'ah*'s claim to excellence as a legal system is based on objective grounds and believe it to have the intrinsic potential to undergo necessary changes without loss of its Islamic character. Their indispensable premise is that the process of independent and innovative formulation of new laws (*ijtihād*) which are derived from the original sources must be resumed. In this regard, he further emphasized that there is a serious need to study *fiqh* and *uṣūl al-fiqh* on the advisability of reviewing the existing laws in order to relate their provisions to the principles and rules of the *Sharī'ah* and interpreting the existing laws in the light of such principles.⁵

6.1 Codified Islamic Law.

One of the most glaring feature of the legal reforms and modernisation in Islām is codification. It is in the interest of the treatment of legislative trend in selected Middle Eastern nations that such analysis has become inevitable. The

⁵G.M.Badr, "Islamic Law and Challenge of Modern Time," in *Law, Personalities and Politics in the Middle East* edited by James Piscatori and George Harris, pp.29-32. See also D.Bondermann, "Modernization and Changing Perception of Islamic Law," *Harvard Law Review* [April 1968], pp.1169-1193.

Sharī'ah rules were not officially codified until recent times. References made to the case of the compilation of the Qur'ān during 'Uthmān's reign, the compilation of ḥadīth during the time of 'Umar b. 'Abd al-'Azīz, Ibn al-Muqaffa's general code of law and Aurangzeb's collection of *fatāwā* - can only be regarded as early attempts linked at codification.⁶ However, the *Sharī'ah* laws remained officially uncoded till the time of Ottoman administration. In the nineteenth century, a number of European codes were prepared and the Ottoman state felt that the needs of the time necessitated the issuing of codes of appropriate laws. Thus was enacted the Commercial Code 1850, the Land Code 1858, the Criminal Code, the Code of Commercial Procedure and the Civil Procedure Code, all based on foreign codes in text, spirit and arrangements.⁷

The Ottoman administration also decided to prepare a civil code. A seven-man committee of jurists called the committee of the Majallah was appointed aiming at "preparing a book on juridical transactions which would be correct, easy to understand, free from contradictions, embodying the selected opinions of the jurists and easily readable by everyone." The Majallah comprises 1,851 articles arranged in an introduction and sixteen books. The introduction consists 100 articles dealing with Islamic legal maxims. The code promulgated in 1875-1876 con-

⁶*Falsafat*, pp.39-42. Also see Ahmad Ibrahim, *ibid*.

⁷For detailed development see M.Khadduri and H.Liebesny [eds.], *Law in the Middle East*, 1955. In evaluating the impact of codifications, Wahbah al-Zuhaylī opined that there were undoubtedly both negative and positive results of such policy. Among the unfavorable consequences are [a] restriction to the codified rules which caused the law to become dormant [b] it will annihilate the *ijtihād* endeavor [c] imposition of a solitary view. Positively, such a move will bring about absolute ease to refer to the codified rules. The differing standpoints are overcome by citing a preferred view adopted in the codification. This will also make possible the standardisation of judicial decisions. See Wahbah al-Zuhaylī, *Juhūd al-Taqtīn al-Fiqh al-Islāmī*, pp.26-28. Also see a critical examination of the development of codification of Islamic law by Ann Elizabeth Mayer, "The *Sharī'ah*: A Methodology or a Body of Substantive Rules?" in *Islamic Law and Jurisprudence* edited by Nicholas Heer, pp.177-198.

sists sixteen books covering all forms of civil transactions as well as on the administration of justice.⁸

The influence of the Ottoman throughout the nineteenth and twentieth century Middle East was significant except in Egypt.⁹ The Majallah was applied as civil law in the Ottoman domains and thus was applicable civil law in Jordan, Syria, 'Irāq and Kuwait. Even when these jurisdictions were promulgating their own modern civil code, the Majallah is useful to fill the gaps in those areas of law not dealt with by other sources.¹⁰ As Ottoman power did not wholly extended to the rest of the Gulf nor to Saudi Arabia, these countries never adopted the Majallah. However, Ottoman influence was occasionally apparent. When King Ibn

⁸The books of the Majallah are as follows :

- a) Sale [*bay'*]
- b) Hire [*ijārah*]
- c) Guarantee and suretyship [*ḍamān wa kafālah*]
- d) Transfer of obligation [*hawālah*]
- e) Pledges and mortgages [*rahn*]
- f) Deposit and trust [*wad'ah*]
- g) Gift [*hibah*]
- h) Wrongful appropriation and destruction [*ghaṣb*]
- i) Interdiction, constraint, pre-emption [*hajr, ikrāh, shuḥ'ah*]
- j) Joint-ownership and partnership [*sharikah*]
- k) Agency [*wakālah*]
- l) Settlement and release [*sulḥ wa ibrā'*]
- m) Admission [*iqrār*]
- n) Actions [*da'wā*]
- o) Evidence and administration of oath [*bayyināt*]
- p) Administration of justice by courts [*qaḍā'*]

See *Falsafat*, pp.43-44. Also see *Civil*, vol.I, pp.1-11.

⁹Though not directly influenced, Egypt did feel the new trend set by the Ottomans especially in the field of codification of Islamic law. *Murshid al-Hayrān* [Guide to the Confused] compiled by Qadrī Bāshā has been noticed as Egypt's Majallah-styled codification though it has been unable to compete with the Majallah, let alone to influence other countries. Despite that, it is still a valuable source of legal development in this area. Qadri who is not a graduate of al-Azhar had a special fondness for Islamic law. He believes that a new code based on the compromise between occidental and Islamic law was favourable. Along this line, he mastered both systems and tried to present Islamic law in a new fashion. For his biography see M.Husain Haykal, *Tarājim Miṣriyyah wa Gharbiyyah*, n.d. His scholarly activities have been described by Farhat Ziadeh in his *Lawyers, the Rule of Law and Liberalism in Modern Egypt*, pp.19-20.

¹⁰Hisham R.Hashim, *The Jordan Civil Code [of Muslim Jurisprudence]*, p.IV (Preface).

Saʿūd wanted to reinforce the commercial law of Saudi Arabia in 1930, he adopted the Ottoman Commercial Code 1850 although it was already outdated. The recent development has witnessed the formulation of the Ḥanbali own compilation known as *Majallat al-Ahkām al-Sharʿiyyah*.¹¹

6.2 The Egyptian Civil Code [1949]

The new civil code, promulgated on 29 July 1948 was brought into force on 15 October 1949. By that, the civil codes serving the Mixed Courts (*maḥākīm mukhtalīṭah*) 1874 and the Native Court (*maḥākīm ahliyyah*) 1883 were repealed. ʿAbd al-Razzāq al-Sanhūrī, a distinguished Egyptian judge and jurist, headed the commission which drafted the new civil code for Egypt. He invited his professor at

¹¹ *Maj. Sharʿiyyah*, 1980. This compilation, by ʿAbdullah al-Qāriʾ, consists of twenty one book, namely :

- I Sale :its various incidents, conditions, options.
- II Hire
- III Loan of consumables
- IV Waqf
- V Gift
- VI Mortgage ; Pledge
- VII Guarantee & Indemnity
- VIII Money Order or Bill
- IX Agency
- X Loan
- XI Deposit
- XII Unlawful Appropriation
- XIII Duress
- XIV Joint-ownership ; pre-emption
- XV Settlement; compromise; release
- XVI Admission
- XVII Partnership
- XVIII Agriculture
- XIX The Judiciary
- XX The case
- XXI Evidence and Oath.

Lyons, Edouard Lambert to draft the general provisions in the preliminary chapter of the code.¹²

Much has been said about the composition of this code. It was suggested that five-sixth of its provisions are based on the previous codes and the interpretation put upon them by Egyptian court. A great deal of emphasis was placed in public debate, not only on the percentage but also on the enrichment of the code from comparative legislation and from the *Sharī'ah*.¹³ Al-Sanhūrī admitted that such a situation did not in fact amount to very much more direct borrowing from the *Sharī'ah* than had been true in the previous codes although he reiterated that he had made a careful choice of principles more consonant with Islamic principles. He stated:

“We did not leave any single sound provision of the *Sharī'ah* which we could have included in this legislation without doing so...We adopted from the *Sharī'ah* what we could adopt, having regard to sound principles of modern legislation and we did not fall short in this respect.”¹⁴

In the light of this statement, Anderson has examined the extent of influence of the *Sharī'ah* on the code.¹⁵ The debt which this code owe to the *Sharī'ah* can best be summarised into four headings. First, the inclusion of *Sharī'ah* as one of the sources from which an appropriate rule can may be derived

¹²[an Edge, op.cit., p.132.

¹³J.N.D.Anderson and N.J.Coulson, "Islamic Law in Contemporary Cultural Change," *Seaculum* XVIII [1967], p.40. See also Anderson, "Recent Development of the Sharī'a II," *MW* vol.XLI [Jan.1951], pp.34-48.

¹⁴*Ibid.* There has been a lengthy debate on the issue of the *Sharī'ah* input in the Egyptian code. Sanhūrī has been subjected to a rigorous interrogations by the 'ulamā' like Ḥassan al-Ḥuḍaybī, Shaykh 'Abd al-Wahhāb Ṭala'at, Sayyid 'Abdullāh 'Alī Ḥusayn regarding his stand on this matter, that is placing Islamic law in the third place as the source of Egyptian law. See 'Umar Sulayman al-Ashqar, *al-Qawānīn al-Ilāhiyyah la 'l-Qawānīn al-Jāhiliyyah*, pp.123-146.

¹⁵J.N.D Anderson, "The Sharī'ah and Civil Law: The Debt Owed by the New Civil Codes of Egypt and Syria to the Sharī'a," *IQ* [1954], pp.29-46.

by the courts in default of any relevant provision.¹⁶ Secondly, the influence which a desire for conformity with the *Sharī'ah* has exercised on the choice made in this code between certain concepts of modern European codes.¹⁷ Thirdly, a few principles or provisions newly borrowed from the *Sharī'ah*, whether exclusively, chiefly or in part.¹⁸ Fourthly, those provisions taken over by previous legislation from the *Sharī'ah*.¹⁹

¹⁶Article 1 of the Code reads: "The provisions govern all matters to which they apply in letter or spirit. In the absence of any provision that is applicable, the Judge will decide according to custom, and, in the absence of this, in accordance with the principles of the *Sharī'ah*. In the absence of these, the Judge will apply the principle of natural justice and the dictate of equity."

¹⁷Anderson suggested that there are few aspects of law by which the *Sharī'ah* influence is evident:

- i) An objective rather than subjective tendency in regard to treatment of obligations and contractual rights;
- ii) The principles applicable to the abuse of rights;
- iii) The legal consequences of exceptional and unpredictable events;
- iv) Provisions regarding the assignment of debt. See Anderson, *ibid.*, pp.33-34.

¹⁸This includes:

- i) Principles regarding *majlis al-‘aqd*, influenced by the Ḥanafis;
- ii) Principles regarding legal capacity, also derived from the Ḥanafis;
- iii) Principles governing the lease of *waqf* property;
- iv) Principles regarding contracts of *hikr*;
- v) Principles governing the lease of agricultural land (*muzāra‘ah*);
- vi) Principles relevant to the termination of a lease on the death of the lessee and the annulment of a lease on the grounds of "serious and unforeseen circumstances";
- vii) Principles applicable to the release of debt by unilateral declaration. See *Ibid.*, pp.35-38.

¹⁹ Among other principles taken over from the *Sharī'ah* are:

- i) Principles applicable to dispositions of property during "death sickness";
- ii) Principles to *ghubn* (lesion);
- iii) Principles regarding the party at whose risk a purchase remains;
- iv) Principles applicable to planting or building on leased land;
- v) Principles relevant to the ownership of different stories in the same building, or of a party wall;
- vi) Principles relevant to the right of pre-emption (*shuf‘ah*);
- vii) Principles relevant to gifts;
- viii) Principles governing settlement of liabilities before an estate can devolve to legal heirs.

From the Islamicist point of view, Wahbah al-Zuhaylī clarified that placing Islamic law as a source of law in that manner has very little practical importance. He stressed that the *qāḍī* will not resort to it except when in the situation when he fails to arrive at any ruling from the codified laws. The possibility for that to happen is quite remote. Nevertheless, this event has contributed to the increase of attention given to Islamic law which later became an impetus for its revival. He specifically praised the value of a comparative study of law, between Islamic and man-made laws, both in theory and practice. He said that : "Every *faqīh* and *qāḍī* has an incumbent obligation to improve the civil code, particularly when there is no textual authority on it, by referring to the principles of *fiqh*, as done by al-Sanhūrī in his *Maṣādir al-Ḥaqq*, p.48. See *Juhūd Taqnīn*, p.35.

The interplay between the principles embodied in the Code and Islamic law is demonstrated by the analysis by Ian Edge on decennial liability.²⁰ Edge suggested that provisions on decennial liability²¹, as embodied in articles 650-653, have been compared to various principles of *fiqh*, to see its compatability with them. As far as the role of *ḍamān* in explaining decennial liability, he has cautiously remarked:

“The main thrust of these provisions is that modern contract known as *‘aqd al-muqāwalah* is said to be comparable with one of the types of the Islamic contract of *ijārah* (hire) in which the hiree is in the position of an *ajir mushtarak*....It is said further, however, that according to Islamic law the *ajir mushtarak* is subject to civil liability (*ḍamān*) for things done in the course of completing the contract, and the commentary then equates this with decennial liability, seemingly supporting its use from Islamic sources. Unfortunely, these slight references to Islamic legal ideas are not sufficiently dealt with nor are they correct to describe this purported liability.”²²

He opined that the concept of *ḍamān* is better considered as a form of tortious liability than as an extended form of contractual responsibility (which is what decennial liability is), even though the word *mutaḍāmin* comes from the same root. Even if it could be used to support this liability, it is clear that in Islamic law, before *ḍamān* could operate, one has to show positively some illicit act (*ta‘addī*) or negligence (*tafrīt*) by the *ajir mushtarak*, whereas decennial liability is a form of strict liability. He also pointed out that there is little reference made in the book of *fiqh* to a contract of construction under *ijārah*. He is suggesting that some answer

²⁰Ian Edge, “The Development of Decennial Liability in Egypt,” in *Islamic Law and Jurisprudence* edited by Nicholas Heer, pp.161-175. Cf. Naim Attia, “Decennial Liability Under Egyptian Law,” *ALQ* (Nov.1986), pp.504-524.

²¹This was originally a French concept of “la garantie décennale” which is a special liability imposed upon a contractor, constructor, engineer and architect for the damage caused by any defect which is discovered in the construction after completion.

²²*Ibid.*, pp.172-173.

could be found under contract of *salam* or contract of *istiṣnāʿ*, as far as the modern contract of construction and decennial liability are concerned.²³

However, Edge's views should be compared with Wahbah al-Zuhaylī's analysis of *ʿaqd al-muqāwalah*. He has suggested that this type of contract has its foundation on the basis of the liability of *ajṭr mushtarak*. He said that the contractor has certain responsibilities namely: a] he must guarantee the quality of the material used in the construction; b] he must take care of the interests of the owner of the building; c] he must give priority over the success of the project; d] he must also execute the work according to the agreed terms and conditions; e] he must guarantee that the damage on the building as a result of his imperfect work unless it is proven that the damage is due to uncontrollable cause.²⁴ Taking these views into consideration, it seems possible that modern Islamic jurists may well be able to find some means of reconciling decennial liability with the basic classical sources.

Discussion of the Egyptian Civil Code is essential because it had a great influence other Arab civil codes subsequently enacted. Apart from the role of al-Sanhūrī in the drafting of most of the civil codes, legal personnel are also trained in Egypt and Egyptian judges have been invited to serve in various jurisdictions in the Middle East. It is also important to see how the increasing adherence to the *Sharīʿah* in later civil codes, like Jordan and the UAE has marked the change to a stronger Islamic input.

²³Ibid., p.173.

²⁴*Uqūd*, pp.276-278.

6.3 The UAE Civil Code

In this code the paramountcy of the *Shari'ah* is evident.²⁵ In the Union Law No.10 of 1973 setting up the Union Supreme Court, it is provided at article 75 that :

" The Supreme Court shall apply the provision of the *Shari'ah*, Union Laws and other laws in force in the member Emirates of the Union conforming to the Islamic *Shari'ah*. Likewise, it shall apply those rules of custom and those principles of natural and comparative law which do not conflict with the principle of the *Shari'ah*."²⁶

In another legislation, Union Courts of First Instance and Appeal [Law 6 of 1978] provides that : "The Union Courts shall apply the provisions of Islamic *Shari'ah*, Union Laws and other laws in force, just as they shall apply those rules of custom and general legal principles which do not conflict with the provisions of the *Shari'ah*."²⁷

The long-awaited Civil Code provides topical and important examples of the increasing trend towards a reassertion of Islām in legislation and jurisprudence

²⁵S.H.Amin said that commercial law of the UAE is a hybrid of the *Shari'ah* and imported statutory law. See his *Middle East Legal System*, 1985, p.396. Also see *Comm.*, pp.3-5.

²⁶W.M.Ballantyne, "A Reassertion of the *Shari'ah* : The Jurisprudence of the Gulf States," in *Islamic Law and Jurisprudence edited by Nicholas Heer*, pp.149-156. Earlier, Ballantyne pointed out that, in the UAE Provisional Constitution, *Shari'ah* is provided as a principal source of legislation. The net effect of art.75 of the Union Supreme Court Law [Law 10/1973] and art.8 of Union Court of First Instance and Appeal [Law 6/1978], that should there be any challenge to the constitutionality of such provisions, the case will be heard before the Union Supreme Court. This is because it is itself the Constitutional Court of the State. See Ballantyne, *Commercial Law in the Middle East : The Gulf State*, pp.57-59.

²⁷Among other significant impacts of this provision is that it has a stronger prescription to respect the *Shari'ah* law and in practice has invalidated arts.61 and 62 of the Abu Dhabi Civil Procedure Code, which allows the civil court to require the levying of interest upon a judgement sum until full amount due had been paid. See *Abdullah Rashid Hilal v. The International Bank of Credit and Commerce* [Civil Appeal no.5 / 1979].

in the Islamic countries. The code consists of 1,528 articles. It has appeared to owe overwhelmingly to provisions of fiqh, conveniently, the Majallah, with undertones of civil law gleaned from Egyptian and other Arab codes, particularly that of Jordan and possibly the Sudān.²⁸

This Federal Civil Code, styled the Code of Civil Transaction²⁹ was published at the end of 1985 and put into effect as from 1 April 1986. This new code is closely based on the Jordanian Civil Code 1976 which is strongly Majallah-based. This is why the same committee of the Jordanian Code took the task of drafting the UAE code. This step is very much in line with the draft proposal of a united civil code for the entire Arab nation produced by the Academy of Islamic Research (*Majma' al-Buḥūth al-Islāmiyyah*).³⁰ In drafting this code, the committee sought the most lenient doctrine of from the Mālikī and Ḥanbalī schools, if it is demanded by necessity. It also resorted sometimes to the doctrine of other schools of law as well as upholding the prevalent custom which had a *Sharī'ah* backing.

"The Legislative provisions shall apply to all matters dealt with by these provisions in the letter and spirit. There shall be no innovative reasoning (*ijtihād*) in the case of provision of definitive import. If the judge finds no provision in this law, he has to pass judgement according to the Islamic Sharī'ah. Provided that he must have regard to the choice of the most appropriate solution from the School of Imām Mālik and Imām Aḥmad bin Ḥanbal, and if none is found there, then from the school of Imām Shāfi'ī and Imām Abū Ḥanīfah, as most befits. If the judge does not find the solution there, then he must render judgement in accordance with custom but provided that the custom is not in conflict with public order and morals. If a custom is particular to a given Emirate, then his judgement will apply to that Emirate.³¹

²⁸W.M.Ballantyne, "The New Civil Code of the United Arab Emirates : A Further of the Sharī'a," *ALQ* vol.I pt.3 [1986], pp.245-264.

²⁹Wahbah al-Zuhaylī suggested tressed that the different title of the code marked a departure from typical Arab codes, as it adopted the name *Qānūn al-Mu'āmalāt al-Madaniyyah* instead of just *Qānūn Madanī*. See his *Juhūd Taqnīn*, op.cit., p.68.

³⁰Ibid.

³¹UAE CC, Art.1

Apart from this clearcut provision on the sources of law, this code also provides that: "The rules and principles of Islamic Jurisprudence shall be relied upon in the understanding, construction and interpretation of these provisions."³² In spelling out the meaning of "public order", article 3 provides that public order must not conflict with the definitive provisions and fundamental principles of the Islamic *Shari'ah*. The committee later reiterated that the implementation of the *Shari'ah* in civil transactions (*mu'āmalāt madaniyyah*) is hoped to set a firm foundation for these practices and for realizing justice and fairness for everyone and cut down civil disputes³³.

The Civil Code of the United Arab Emirates, is composed and arranged in an introduction and four chapters. The introduction comprises provisions governing the application of law with regard to time and place³⁴, certain jurisprudential maxims and rules of interpretation³⁵, status of a person³⁶, deliberations on things and property³⁷ and classification of rights including abuse of rights and proof of rights.³⁸

³²UAE CC, art.2. The exact expression employed in code is "*qawā'id wa uṣūl al-fiqh al-Islāmī*" which should apply to the rules of *Uṣūl al-Fiqh* (Islamic Jurisprudence) and *Qawā'id Fiqhiyyah* (Islamic Legal Maxims), the tools for the understanding of Islamic Law or Islamic Legal Rules (*Fiqh*). James Wheelan's translation of the code cited *fiqh* as Islamic Jurisprudence. However that is not correct as is clearly shown by this article. Wahbah al-Zuhaylī has pointed out that: "In the second part of the introduction, this code has embodied some legal maxims [arts.29-70] taken from the classical sources of Islām, the majority of which are part of the introduction of the *Majallat al-Ahkām al-'Adliyyah*." He asserted that this proves the strong reliance of this code to *Shari'ah* sources, particular those of the Ḥanafīs. This is also the case the Jordanian Civil Code on which the UAE code relied substantially. Majority of the provisions are drawn from the Ḥanafīs, then the Mālikīs and Ḥanbalīs. See *Juhūd Taqnīn*, p.69.

³³Ibid.

³⁴Arts.1-28.

³⁵Arts.29-70.

³⁶Arts.71-94.

³⁷Arts.95-105.

³⁸Arts.104-123.

Article 124 spells out the question of personal obligations and rights. The provision reads: “Personal obligations or rights arise out of dispositions, legal events and the law; and the sources of obligations shall be as follows : contracts, unilateral acts, acts causing harm (tort), acts conferring a benefit and the law.”³⁹

Part one of chapter one is on the general theory of contract. It includes provisions on general matters of a contract⁴⁰ including its elements, validity and its effect⁴¹ various options⁴², as well as the construction of a contract⁴³ and finally the dissolution of a contract.⁴⁴ Part two of this chapter deals with unilateral dispositions⁴⁵ Part three is on acts causing harm in which the law spells out clearly the question of liability for personal acts⁴⁶, liability for the act of others⁴⁷ and liability for animals and objects and use of the public road.⁴⁸

Provision for a contract conferring ownership, particularly sale is in book two at article 489-567. Here, the definition of sale and the effect of sale in the sense of obligations of both the seller and the purchaser are explained. That includes transfer of ownership as part of the obligation of the seller⁴⁹, delivery of the property sold⁵⁰ and liability for latent defects⁵¹. On the part of the purchaser,

³⁹Placed under book one, chapter one of the code.

⁴⁰Arts.125-128.

⁴¹Arts.129-242.

⁴²Arts.243-256.

⁴³Arts.257-266.

⁴⁴Arts.267-281.

⁴⁵Arts.276-281.

⁴⁶Arts.299-312.

⁴⁷Art.313.

⁴⁸Arts.314-317.

⁴⁹Arts.511-513.

⁵⁰Arts.514-542.

⁵¹Arts.543-555.

his obligations include payment of the price and taking delivery of the goods and the cost of sale.⁵² Various types of sale are mentioned like forward sale, deferred sale, sales of fruit and the like.⁵³

Provisions for companies and partnership are divided into two section. Section one is on general issues pertaining to partnership⁵⁴ whereas section two is on specific types of companies like companies to perform work⁵⁵, speculative venture partnership⁵⁶ and *muḍārabah* companies.⁵⁷ Articles 710-721 are on loans (*qurūd*) whereas articles 722-741 deliver the law on accord or settlement of disputes (*ṣulḥ*).

Chapter II is meant for usufructuary contracts. In part one, hire was discussed in detail. Section one containing 54 article is on hire in its general terms, which include definition, elements and effects of hire, rights and obligation arising therefrom and methods to terminate hire.⁵⁸ In section two, the code specified certain types of hire like lease of agricultural land⁵⁹, sharecropping (*muzāraʿah*)⁶⁰, a contract to perform work on another's agricultural land in consideration of part of the crop (*musāqah*)⁶¹, joint-ownership of land and crop (*mughārasah*)⁶² and lease of charitable endowment (*waqf*)⁶³.

⁵² Arts. 556-567.

⁵³ Arts. 568-606.

⁵⁴ Arts. 654-682.

⁵⁵ Arts. 683-690.

⁵⁶ Arts. 691-692.

⁵⁷ Arts. 693-709.

⁵⁸ Arts. 742-796.

⁵⁹ Arts. 797-808.

⁶⁰ Arts. 809-821.

⁶¹ Arts. 822-834.

⁶² Arts. 835-837.

⁶³ Arts. 838-848.

Chapter III concentrates on contracts of work. In the definition and scope of a *muqāwalah* (contract to make anything or to perform a task) is spelt out⁶⁴, together with the effects of a *muqāwalah*⁶⁵, subcontracting⁶⁶ and termination of a *muqāwalah*. The contract of employment is discussed at articles 897-923. Next come the contract of agency⁶⁷, the contract of bailment⁶⁸ and the contract of custodianship or stakeholding⁶⁹. The contract of insurance is given in chapter IV of this code.⁷⁰

Suretyship is dealt with in chapter V from articles 1056-1105. This include the provision for elements of suretyship⁷¹, securing attendance of a person⁷², *darak* suretyship [guarantee to give indemnity if goods sold are owned by a third party]⁷³, effects of suretyship⁷⁴ and the termination of suretyship.⁷⁵ A closely related subject, that is assignment (*hawālah*), is given from articles 1106-1132.

Before the topic of securities for property is elucidated, the code has provided an important prelude by showing, in Book three, original rights *in rem*. This includes the question of ownership, means of its acquisition, right of pre-emption, possession and certain rights of where benefits are derived from ownership, like enjoyment, use and easement.⁷⁶ Book four deals with provision of securities for

⁶⁴Arts.872-874.

⁶⁵Arts.875-889.

⁶⁶Arts.890-891.

⁶⁷Arts.924-961.

⁶⁸Arts.962-996.

⁶⁹Arts.997-1011.

⁷⁰Arts.1026-1055.

⁷¹Arts.1056-1067.

⁷²Arts.1068-1074.

⁷³Arts.1075-1076.

⁷⁴Arts.1077-1098.

⁷⁵Arts.1099-1105.

⁷⁶Arts.1133-1398.

property, namely pledge or mortgage by way of security⁷⁷ and possessory pledges⁷⁸ Finally, chapter III of the code explains the question of priority rights or *lien*, which is vital in most settlements of mortgage agreements.⁷⁹

6.4 Provisions for *Ḍamān* in the UAE Civil Code.

In the sense of suretyship, the code has adopted the Ḥanafī rules. The definition of *kafālah* is simulated from the *Majallat al-Aḥkām al-ʿAdliyyah*⁸⁰, so as the case with the classification of *kafālah*⁸¹. Article 1068 reads :

“(1) Surety for the person obliges the guarantor to produce the person guaranteed at the time stipulated at the request of the beneficiary of the guarantee and if he does not do so, it shall be permissible for the judge to impose an exemplary fine, but it shall be permissible for him to exempt him if he proves that he was unable to secure the attendance of the person guaranteed.

(2) If the surety for a person has undertaken to pay a specific sum by way of a penalty clause in the event that he does not secure the attendance of the person guaranteed, he shall be bound to pay the sum, as the judge may exempt him from it either in whole or in part if it appears that the course is justified.”

The inclusion of the clause for exemplary fine (*taʿzīr mālī*) is something new and needed for the smooth administration of justice. This rule is again adopted from the Ḥanafīs but it is also found in some other schools. The reason behind this

⁷⁷Arts.1399-1447.

⁷⁸Arts.1448-1503.

⁷⁹Arts.1504-1528.

⁸⁰Art.612. Article 1056 of UAE CC reads : Suretyship is the joining of the liability of a person called the surety with the liability of the obligor in the performance of his obligations.

⁸¹Arts.613-617. See also *ʿUqūd*, p.234. The code accepted the Majallah’s three-tier prescription - *kafālah bi ʿl-naḥs*, *kafālah bi ʿl-māl* and *kafālah bi ʿl-darak* representing a strong package of personal suretyship prevalent in Islamic law. See discussion in Chapter II, *supra*, pp.46-53.

clause is the preservation of public interest (*ri'āyatan li 'l-maṣlahah*).⁸² Article 58 of the Majallah strengthens this clause by a celebrated maxim : "The exercise of control over subjects is dependant upon the public welfare."⁸³

The code has also come up with a provision spelling out the difference between *kafālah* and *hawālah*. Article 1065 reads : "Suretyship conditional on the discharge of the principal obligor is an assignment [of obligation]. An assignment which provides that the the assignor should not be discharged is a suretyship."⁸⁴ This clearly demonstrated the adoption of Ḥanafī rules on the subject.

The code has also borrowed from *Murshid al-Ḥayrān*⁸⁵ regarding ruling on the suretyship for a person who is dying. This rule is closely linked to rules on bequest but is consequential to loss of rights of various interested parties. The provision reads : "Suretyship for a person suffering a terminal illness shall not be valid if the debtor owes a debt greater than the amount of his property." ⁸⁶ The suretyship, however, shall be valid if the debt is not greater than the amount of property and the provision on wills shall apply thereto.⁸⁷

The acceptance of *ḍamān al-darak* in this code reflected the adoption of a rule decided unanimously by the jurists which was an exception (*istithnā'*) from the general rule. As a general rule, the guaranteed right must be an established debt

⁸²*Uqūd*, p.311 ; *Maj. 'Adliyyah*, art.651 ; *Murshid*, art.850.

⁸³*Civil*, p.22. Also see art.1069 of the UAE CC : If the surety undertakes to pay the debt upon his failure to deliver the person guaranteed, he must pay it.

⁸⁴Cf. *Maj. 'Adliyyah*, arts.648-649. This is supported by the maxim : In contracts, effect is given to intention and meaning and not to words and phrases [*Maj. 'Adliyyah*, art.3]. See also *Sh. Bāz*, vol.I, p.5 and discussion in Chapter II, *supra.*, p.80.

⁸⁵Art.843.

⁸⁶Art.1064 (1).

⁸⁷Art.1064(2). See also *Jordanian Civil Code*, art.957.

(*dayn thābit*) and the validity of *ḍamān* depends on the existence of the debt. It is rather inconceivable if *ḍamān* is antecedent the debt. As the guarantee for payment of the price to the seller is a *dayn ṣaḥīḥ* on the buyer, it is equally legitimate to allow the same to the buyer in the event of default of ownership.⁸⁸ In such a case, the debt is not yet in existence and it is difficult for *ḍamān* to be applied. However, in the case of *ḍamān al-darak*, payment is required before *ḍamān* arises. A rightful claim resides in the property before the contract is concluded and only the buyer is entitled to the guarantee for *darak*.

a) Effects of Suretyship [between surety and guaranteed person]

The obligations of the parties to a *kafālah* contract are set forth at article 1077-1092. Basically, these provisions define the legal consequences on the surety, on the creditor and on the surety capability to redirect the liability to the principal obligor.⁸⁹ As in the classical rules, the code adopted the ruling that the surety must discharge his obligation when the time falls due.⁹⁰ On the other hand, the obligee may claim against the principal obligor or the surety or may claim against them both.⁹¹ If the surety has another surety, the creditor may claim from anyone he wishes. However, claiming from any one of them would not relinquish the creditor's right to claim his rights from the remaining obligors in the event of non-

⁸⁸This is why this type of guarantee is called *ḍamān al-darak* or *ḍamān al-uhdah*. See Wakin, *Function of Document*, p.60. For classical treatment see *Mughnī*, vol.V, pp.76-78 ; *Umm*, vol.III, p.203 ; *Ashbāh.S*, p.490 ; *Badā'ī*, vol.VII, p.3420. See Chapter, II, pp.52-23 and Chapter III, pp.98-101.

⁸⁹The classes of *athār* of the *kafālah* are : *āthār tata'allaq bi 'l-kafīl*, *āthār tata'allaq bi 'l-dā'in* and *āthār tata'allaq bi rujū' al-kafīl 'alā 'l-aṣīl*. See *Uqūd*, pp.321-326.

⁹⁰UAE CC Art.1077. Cf.*Maj. 'Adliyyah*, Arts.634, 637, 639, 643.

⁹¹UAE CC Art.1078.Cf.Chapter II, supra., pp.69-75.

payment by the one he made a claim against. This is taken from the Ḥanafī doctrines.⁹²

For administrative purpose and offering the surety some facility, article 1091 requires the obligee to submit all papers related to the suretyship to the surety. The provision reads: "The obligee must deliver to the surety upon discharge by him of the debt all necessary papers to enable him to exercise his right of recourse to the principal obligor." According to al-Zuḥaylī, this situation can be treated as *muqaddimat al-wājib* (prerequisite for performance of an obligation).⁹³ If the debt is jointly secured by other means of security like pledge, it is also incumbent upon the creditor to pass the property or the rights attached thereto to the surety. The surety will have to bear the costs of such transfer and may have recourse for these costs against the principal obligor.⁹⁴

Equally important, article 1092, rules that a debt which falls due must be claimed by the creditor within six months from the date on which it fell due, otherwise the surety shall be deemed to have been discharged.

"If payment of debt falls due on a certain date, the creditor must claim within six months from that particular date. If no claim is made, the surety may notify the creditor using an established procedure. If there is no action taken, the surety is subsequently disengaged from *kafālah* so that he will not be jeopardized should the debtor suffers unexpected financial setback (*i'sār ṭārī'*) or other reasons that will circumvent accomplishment of the rights. Injury must be removed as injury is prohibited absolutely whether inaugurate or as a rejoinder."⁹⁵

⁹²Maj. 'Adliyyah, Arts.626, 644, 645. See also Chapter II, supra., pp.69-75.

⁹³The maxim reads : [*mā lā yatimmu 'l-wājib illā bihi fa huwā wājib*]

⁹⁴Art.1091(2).

⁹⁵*Uqūd*, p.322.

When a debtor become insolvent, the creditor must provide proof of the debt due to him in the bankruptcy, otherwise his right of recourse against the surety shall lapse to the extent of the loss sustained by his not having so done. al-Zuḥaylī claimed that such principle is derived from the Shāfiʿī and Mālikī schools of law.⁹⁶

Article 1090 reminded the surety to be prudent when discharging the obligor's liability as no right of recourse to the principal obligor is granted if suretyship arose at the request or with the consent of the principal obligor. He shall have any right of recourse in respect of early payment of a deferred debt until such time as the debt would fall due.⁹⁷

At the inception, the surety is obligated to fulfil his obligation (*al-wafāʾ bi ʿl-iltizām*). If the suretyship is unqualified (*muṭlaqah*), the obligation of the surety shall follow the obligation of the principal obligor, whether the debt is payable immediately or deferred.⁹⁸ If the surety guarantees an immediate debt (*dayn muʿajjal*) by way of deferred suretyship, the debt as against both the surety and the principal obligor shall be deferred unless the surety stipulates that deferment shall apply to himself alone or the obligee stipulates that the debt should be deferred with regard to the surety only. In that event, the debt shall not be regarded as deferred with regard to the principal obligor.⁹⁹

In certain situations, suretyship is affiliated to some other prior negotiations. For instance, it shall be permissible for the suretyship to be conditional upon

⁹⁶Ibid.

⁹⁷UAE CC Art.1090(1)(2).

⁹⁸UAE CC Art.1080.

⁹⁹UAE CC Art.1081.

the discharge of the debt out of the property of the obligor deposited (as *wadī'ah*) with the surety, on condition that the obligee agrees thereto.¹⁰⁰ If a debt is secured by a security in rem (*ta'mīn 'aynī* or *rahn ḥiyāzī*) prior to the suretyship arising and the surety has made it a condition that recourse should be made against principal obligor first, it should be permissible to execute against the property of the surety prior to executing against the property standing as security for the debt.¹⁰¹

b] Relationship Between the Surety and the Principal.

In a *kafālah* deal, the essence is the personal guarantee. Accordingly, if the surety gives any other thing in lieu of debt, then his recourse as against the principal obligor shall be for that which he stood surety and not for that which he actually gave.¹⁰² If the obligee accepted a proportion of the debt in settlement (*ṣulḥ*), then the recourse shall be only for the amount paid by way of settlement not for the entire debt.¹⁰³

Article 1094 provides that if the principal obligor pays the debt before the surety pays it or if he learns of any reason preventing the obligee from making a claim, he must notify the surety or if he does not do so and the surety discharges the debt, he may then as his choice have recourse against the principal obligor or the obligee. In addition, if a claim is made against the surety, he must join the principal obligor therein and if he does not do so it shall be permissible for the

¹⁰⁰UAE CC Art.1079. See *Uqūd*, p.323.

¹⁰¹UAE CC Art.1082.

¹⁰²UAE CC Art.1093. The text reads : [*fa innahu yarjī' bi mā kafalahu lā bi mā addāhū fī'lan idhā addā 'iwaḍan 'an al-dayn shay'an ākhar.*

¹⁰³*Badā'i'*, vol.VI, p.15; *Maj. 'Adliyyah*, Art.657; *Murshid*, Arts.863-864.

principal obligor to raise as against him any defences which it would have been competent for him to raise in the claim brought by the obligee.

These two-tier duties, according to al-Zuḥaylī, are complementary procedural rules. To ensure smooth process of payment of the debt and thus release of suretyship, the creditor is duty bound to notify the surety about the debt he has paid. On the same basis, the surety is responsible for including the principal obligor in any litigation pertaining to the secured obligation. They are both based on *maṣlahah*. The root of the creditor's duty is the surety's inherent right to ask from the principal obligor to release him from the liability if it not requested by him. The second issue is attributed to the right of the principal obligor to defend himself against any action taken against him.¹⁰⁴

The law at article 1095 also provides that a surety for property or for delivery the person may make an application for an order preventing the person for whom he stands surety from travelling abroad if the suretyship arose through his order and there is evidence giving rise to a fear that the surety will suffer loss.

c] Termination of Suretyship.

Despite the fact that most textbook of Islamic law only enumerated a few grounds for termination of suretyship, namely *adā'*, *ibrā'* and *ṣulḥ*, the code has

¹⁰⁴*Uqūd*, p.325. Al-Zuḥaylī asserted that this provision could be equated to that of article 1637 of the Majallah: "It is required that both parties in *wadī'ah*, *'āriyah*, *ijārah* and *rahn* to attend the litigation related thereto."

included eight grounds, including those disputed grounds amongst the schools of law.

Article 1099 set forth those grounds as follows:

- [a] By discharge of the debt¹⁰⁵;
- [b] By loss of the thing held by the *makfūl* by *force majeure* and before claim¹⁰⁶;
- [c] By the cessation of the contract by virtue of which the right against the principal obligor arose¹⁰⁷;
- [d] If the obligee discharges the surety from his suretyship or the principal obligor from his debt¹⁰⁸
- [e] Upon the death of the principal obligor¹⁰⁹;
- [f] By the principal obligor being brought to the place of delivery after the deferred time matures notwithstanding that the obligee refuses to accept delivery unless he is unlawfully prevented from doing so¹¹⁰ ;
- [g] By bringing the principal obligor before the period falls due, and the obligee suffers no loss through taking delivery of him¹¹¹ ;
- [h] By handing over the principal obligor himself, in order to fulfil the very purpose of the suretyship¹¹².

¹⁰⁵[*Adā' al-dayn ilā 'l-Dā'in*]

¹⁰⁶[*Talifa al-'ayn allati taht yadd al-makfūl bi quwwat qāhirah wa qabl al-ṭalab*].

¹⁰⁷[*Zawāl al-'aqd alladhī wajaḥ bihi al-ḥaqq 'alā 'l-makfūl*].

¹⁰⁸[*Ibrā' al-dā'in al-kafīl min al-kafālah aw ibrā' al-madīn min al-dayn*].

¹⁰⁹[*Mawt al-makfūl*]. Cf. UAE CC Arts.1102-1103.

¹¹⁰[*Iḥdār al-makfūl bi nafsih fī makān al-taslīm ba'd inqidā' al-ajal*].

¹¹¹[*Iḥdār al-Makfūl qabl ḥulūl al-ajal, wa lā ḍarar 'alā 'l-makfūl lah fī tasallumihī*].

¹¹²[*Taslīm al-makfūl nafsah li taḥaqquq al-gharaḍ al-maṭlūb min al-kafālah*]. Cf. Chapter

d] Other Methods of Security.

The code provided *hawālah* as a means to securing fulfilment of an obligation at articles 1106-1132. *Hawālah* is defined as : the transfer of a debt and claim from the liability of a transferor to the transferee.¹¹³ As a consequence, the creditor shall have the right to make a claim against the transferee and the transferor shall be discharged from the debt and claim together if the claim is validly made.¹¹⁴

To ensure that the practice is sound, the law require the transferor to deliver the creditor the document of title relating to the obligation transferred and any necessary evidence or means to enable him to obtain his right.¹¹⁵ This transfer, however, according to another provision shall retain all the guarantees attaching to the debt in its original form of despite the fact that the person of the debtor has changed. The surety (*kaftl*), whether *in rem* or *in personam*, shall not remain liable to the creditor unless he has agreed to the transfer.¹¹⁶ In the event that the transferor guarantees to the creditor the insolvency of the transferee, such guarantee relates only to his solvency at the time of the transfer unless a contrary agreement is made.¹¹⁷

In Islamic law, other than *hawālah*, pledge or mortgage is another important means of security. It is done by way of the appropriation of a specific property

¹¹³UAECC Art.1106. Concerning other methods of security, see Chapter II, *supra.*, pp.54-59.

¹¹⁴UAECC Art.1116.

¹¹⁵UAECC Art.1125.

¹¹⁶UAECC Art.1119.

¹¹⁷UAECC Art.1126.

usually owned by the debtor for security of the right of the creditor for the payment of the debt. There are two types of real securities, one is involving the transfer of possession of specific property known as possessory pledge (*rahn ḥiyāzī*) and formal pledge (*rahn rasmi aw ta'mīnī*). The formal pledge is limited to immovable property while possessory pledge embraces both movable and immovable property.¹¹⁸

Although this classification is a new theme in analysing *rahn*, it has not departed from the original concept of security for payment of debt (*ta'mīn al-dayn wa ḍamān al-wafā' bihi*). Furthermore, *rahn* is more needed in loans involving massive amounts, whether on its own strength or in association with *kafālah*. *Kafālah* will normally be useful in loans of insignificant sums, if it is used separately. In the UAE code, *rahn* is defined based on the Ḥanafī rules¹¹⁹ as a contract whereby the obligee acquires over real property allocated for satisfaction of his debt, a right *in rem*, whereby he shall take precedence over ordinary obligees and obligees subsequent in rank to him in satisfaction of his right out of the proceeds of such real property, in the possession of whomsoever it may be.¹²⁰ *Rahn ḥiyāzī* is a contract giving rise to a right to retain the property in the hands of the obligee or the hands of a stakeholder as a security for a right which may be recovered thereabout in whole or in part in priority over other obligees.¹²¹

There are various other provisions, with close relevance to sources of Islamic jurisprudence. For instance, pledge shall be indivisible and each part of the

¹¹⁸F.J.Ziadeh, *Property Law in the Arab World*, pp.74-88. See also *Uqūd*, pp.343-344.

¹¹⁹*Maj. Adliyyah*, art.701 ; *Murshid*, art.975. Cf. Chapter III, pp.166-173.

¹²⁰UAECC art.1399.

¹²¹UAECC art.1448.

real property pledge shall stand as security for the whole of the debt and each part of the debt secured by the real property pledged.¹²² Another proviso added to the code is regarding pledge of moveables, which requires such moveables to be registered under other regulations like cars, ships and others.¹²³ Al-Zuḥaylī maintains that such rules have their root in the idea of promoting *maṣlahah*.¹²⁴ As has been spelt out in the classical sources, article 1408 also mention about the meaning of land, which includes the appurtenances like buildings, cultivation, affixation and others.

Article 1414 asserts that the pledgor shall be guarantor (*dāmin*) of the property pledged and shall be liable in full for its safety until the date the debt is paid. The pledgee may make objection to any deficiencies in the security and may utilize any possible steps to preserve his right and the value of the property. He may also have recourse to the pledgor for the costs of having to do so.

The question of destruction of the pledged property is discussed at articles 1415 to 1417. If the destruction is attributed to the default of the pledgor, the pledgee shall have the right to require that his debt be paid immediately or that sufficient security for his debt be provided.¹²⁵ If the pledgor had nothing to do with the damage, he may choose between providing sufficient security for the debt or discharging the debt prior to the maturity date thereof.¹²⁶ If acts take place which are such to expose the property pledged to destruction or damage or which may render the property insufficient as a security, then the pledgee may apply to the

¹²²UAECC art.1410.

¹²³UAECC art.1411.

¹²⁴*Uqūd*, p.342; See also *aMaj. Adliyyah*, art.85.

¹²⁵UAECC art.1415(1).

¹²⁶UAECC art.1415(2)

court for an order that such acts cease and that steps be taken to prevent any occurrence of them.¹²⁷

e] Rules on Insolvency.

In accordance with the guidelines of the Islamic legal system, the law has regulated in a firm manner the debtor's insolvency by imposing *ḥajr*. This is to protect the interest of the creditors. The code employs the term restriction instead of interdiction for *ḥajr*. It is provided that such measure may be placed on an obligor if his obligations due exceed his assets.¹²⁸ This law finds its foundation in the *Shari'ah*'s approval of imposing *ḥajr* on a bankrupt debtor from executing any financial transactions, based on provisions of the Ḥanafīs.¹²⁹

The imposition of *ḥajr* has to go through the judicial order (*ḥukm qadā'i*) based on the demand of the creditors or even from a single creditor.¹³⁰ Imposition of the interdiction insisted by the debtor himself is also accepted, as that is beneficial for him as well as the creditors.¹³¹

Article 404 provides the procedures utilized to implement *ḥajr*. The clerk of the court must, on the day on which the application for interdiction is lodged, register the contents of the claim in a special register arranged in order of the names of the obligors over whom an interdiction is applied for. He must also take

¹²⁷UAECC art.1415(3).

¹²⁸UAECC art.401.

¹²⁹*Maj. 'Adliyyah*, arts.959-999. Cf. Chapter II, *supra.*, pp.82-85.

¹³⁰This is a Mālikī decision.

¹³¹This is a Shāfi'ī view. See *'Uqūd*, p.342.

a note in the margin of the said register of the order made in the claim and of any order confirming or reversing it, on the same day that such order is made.¹³²

The interdiction shall have some consequences. Among others, any deferred obligations due by the obligor shall become due, any disposition by him over his existing and future property shall be ineffective as against his obligees as a whole and any acknowledgement of an obligation made by him to another person shall be ineffective as from the time the order is registered.¹³³ Subsequently, the property of the obligor shall be sold and divided among the creditors by way of *pro rata* sharing in accordance with the procedures laid down by law and he shall be left such money as he needs to maintain himself and other persons whom he has an obligation to maintain.¹³⁴

The interdiction order will be removed by the order of the judge having jurisdiction, if the property subject to an interdiction is divided among the creditors, if it is established that the obligations of the obligor do not exceed his assets and if the obligor satisfies his obligations which have fallen due without the interdiction having any effect and the obligor has discharged all the instalments that have fallen due.¹³⁵

f] Ḍamān in the sense of *gharāmah* in contract.

¹³²UAECC art.404(1).

¹³³UAECC art.406.

¹³⁴UAECC art.408.

¹³⁵UAECC art.410(1).

As far as *gharāmah* is concerned, it covers various types of nominate contracts. Despite that, the provisions on the general principles of contract are sufficient to cover the purpose of treating all of them. Specific nominate contracts with distinct issues are dealt with separately.

The clearest demonstration of the rules, as in the classical manuals, is enshrined in the chapter on sale as well as in the section on the general theory of contract. Rayner observed that the definitions on modern commercial sales are narrower¹³⁶ as the UAE code defines it as: the exchange of non-money property for money.¹³⁷ In *fiqh* sale is known as the exchange of one commodity for another of which one is called the object and the other the price.¹³⁸

As regards the various prescriptions on contractual matters in the code, the predominant rules of *fiqh* are adopted. As far as offer and acceptance (*ījāb wa qabūl*) are concerned, the code has demanded the similar requirements purposive to ensure a perfect contract is concluded. If such is being properly observed, it will reduce the possibility of the occurrence of any defective elements in the contract.¹³⁹ Article 136 specifically recognizes the concept of *khiyār majlis* (option of the session). The provision ruled that while the two contracting parties are still in ses-

¹³⁶Sue Rayner, *The Theory of Contract in Islamic Law*, p.103.Cf. Chapter III, *supra.*, pp.87-175.

¹³⁷UAECC art.489. Cf. Art.115 of the Federal Commercial Code of the UAE (1993) and art.93 of Bahraini Commercial Code 1987. Details could be found in W.M.Ballantyne, "Notes on the Commercial Code of Bahrain," *ALQ* vol.II [4], Nov.1987, pp.352ff.

¹³⁸*Madhāhib*, vol.II, p.147.

¹³⁹UAECC Arts.129-148.

sion¹⁴⁰, each party retains the right to revoke any agreement made between them from the moment they came together.¹⁴¹

Sue Rayner maintains that modern legislation governing the legality of the object of sale states that illegal property consists of “anything forbidden by a provision of the law or contrary to public policy or morals.”¹⁴² The UAE code is using the series of requirements enunciated in *fiqh* such as legality (*mashrūʿan*), existence (*mawjūdān*), the capability of being held in usufruct and delivered (*musallaman*) and the property constituting lawful benefit (*muntafiʿan sharʿan*).¹⁴³ The general provisions contained in this part¹⁴⁴ shall apply to nominate and innominate contracts¹⁴⁵. With regards to rules applying to certain contracts only, the special provisions governing the same shall be laid down in this law¹⁴⁶ or in other laws.¹⁴⁷

g] Formalism in Contractual Relationship.

¹⁴⁰This means that they have not gone their separate ways and are still effectively together. See James Wheelan’s note in his translation of the UAE code p.48.

¹⁴¹Al-Zuhaylī asserts that this concept corresponds the concept of *khiyār al-qabūl* promulgated by the Hanafi school. See *ʿUqūd*, p.16.

¹⁴²UAECC art.205(2) and 126. Also see the definition of public policy and moral, *supra*. In addition to immorality and against public policy, the consideration for “harm to person or property of third party” is also assumed to be catered for in this code. See Sue Rayner, *The Theory of Contract*, p.131.

¹⁴³*Maj. ʿAdliyyah* art.205 states: If the object does not exist the sale of it is invalid (*bāṭil*). Art 211 reads: “The sale of property which is not *nutaqawwim* is invalid.” The concept of *māl nutaqawwim* is defined at article 127 as: “A property the benefit of which is permissible by law to enjoy.” Detailed treatment can be consulted in *Maṣādir*, vol.IV, p.135. In addition to that art.203(1) requires that: In commutative contract involving property the subject-matter must be specified in such a way as to avoid gross uncertainty (*gharar*) by reference to it or to the place where it is located at the time of the contract or its statement of distinguishing characteristic and the amount thereof must be stated if it is moveable property and the like, so as to avoid gross uncertainty.

¹⁴⁴Part I on Contracts [section I : General Provisions]. UAECC arts.125-128.

¹⁴⁵UAECC art.128(1).

¹⁴⁶The Law of Civil Transactions of the UAE 1985.

¹⁴⁷UAECC art.128(2).

With regard to the form of contract, the principle is that the expression of intention will be taken into consideration if the expression is unequivocal. But if the expression is not clear, then the intention will be taken into account.¹⁴⁸ This prominent consideration afforded to the true will and consent in modern Islamic legal philosophy is manifested in the modern codes. Article 258(1) of the UAE code provides: "That which is a consequence in contracts is intention and meaning, not expression and form."¹⁴⁹

It may be remarked that the principal purpose for introducing formalities into a system of contracts is primarily to introduce clarity and to provide an unambiguous forum by which to express the parties' intention. It may also serve to make the parties to realise their responsibilities and duties regarding contracts. The general trend with formalities, however, has been to move away from the freedoms enjoyed by early Muslims. To an increasing extent, written evidence is becoming the requisite. The complexities of modern commerce life have led not only to increased documentation in contracts but the current state of affairs renders it no longer advisable to enter into undocumented contracts. The modern legislation too has made it a characteristic and requires the formality of documentation for evidence at law.¹⁵⁰

¹⁴⁸*Maṣādir*, vol.II, p.90.

¹⁴⁹Cf. Art.3 of *Maj. Adliyyah* : In contracts effect is given to intention and meaning and not to the words and phrases. Also see *Civil*, p.17.

¹⁵⁰This is especially so within the fields of company and real estate laws, particular those related to [a] articles and memorandum of association; [b] commercial agency contract; [c] company registration; [d] rent; [e] mortgage and lease contracts. See Sue Rayner, *The Theory of Contract*, pp.167-168.

The importance of this formality is emphasised by a decision in the case of *The Ras al-Khaimah Asphalt Co. and The Bank of Oman v. Lloyds Bank (and Others)*. In this case, one of the formalities of Islamic law, namely that monies of a *qard* loan should be delivered to the borrower for the contract of *qard* to be of effect, was not adhered to. A European businessman has offered the R.A.C, heavily indebted to the Bank of Oman, a loan of twenty million Deutschmarks to repay its debt. The loan was to be repaid by nine bills of exchange, maturing at various times over a five years period. These bills, duly drawn on and accepted by the R.A.C. and guaranteed by the Bank of Oman, were handed over to the businessman who promised to deliver the loan money within a few days. The monies never reached the company. Instead, the bills were discounted in the European financial market; the proceeds were cashed and disappeared. The businessman was prosecuted, convicted for fraud and sentenced to seven years imprisonment. Three of the bills had been bought by Lloyds Bank International Limited and in September 1978 the company and the Bank of Oman sought a judicial order in Ras al-Khaimah to prevent Lloyd Bank and other purchasers from taking any step to enforce payment of the bills. The court of Ras al-Khaimah is facing the legal incidents and effects of the commercial paper of modern international finance.¹⁵¹

On November 1, 1978 the court ruled that the first defendant failed to perform his obligation in paying the sum agreed upon to R.A.C. Accordingly the agreement concluded between R.A.C. and the first defendant is no contractual agreement at all and consequently the guarantee proffered by the Bank of Oman is totally devoid of legal effect.¹⁵² In looking behind the formal obligations of the sig-

¹⁵¹Ras al-Khaimah Civil Court Suit 397/78 cited in *Commercial*, pp.1-3.

¹⁵²*Ibid.*

natory of a bill of exchange to the reality of the initial transaction on which it was founded, the judgement of the Civil Court of Ras al-Khaimah is an outstanding example of decision based on *fiqh*. The concept of *qard*¹⁵³ ruled that it is not binding unless the monies is delivered to the borrower. As there was no loan at all to the R.A.C., and since a guarantee must relate to a binding debt (*dayn ṣaḥīḥ*), there was no legal basis for the guarantee given by the Bank of Oman.¹⁵⁴

h] Obligations of the Contracting Parties.

The vendor is obligated by the concluded contract to transfer the ownership of the sold property to the purchaser¹⁵⁵ and other rights *in rem* over moveables and real property may be transferred by contract if the elements and conditions thereof required by law are satisfied¹⁵⁶. The exception is when deferred price or paying by instalment is agreed, the seller may stipulate that the transfer of ownership be suspended until he pays the whole price, notwithstanding that the goods have been delivered¹⁵⁷. Such a rule is needed to offer the seller a kind of protection of his right (*ḍamān ḥaqqiḥi*) to secure full payment of the purchased merchandise. He is capable, according to this arrangement, to repossess the merchandise in the event of default of payment, without having to compete with the buyer's other creditors.¹⁵⁸

The vendor is also allowed to demand the revocation of the contract as a result of default of payment by virtue of article 425 on general liability. The

¹⁵³In his report, Coulson was referring to *ʿāriyyah* which is supposed to be *qard*.

¹⁵⁴*Commercial*, p.3.

¹⁵⁵UAECC art.511-513.

¹⁵⁶UAECC art.1275.

¹⁵⁷UAECC art.513(1).

¹⁵⁸*Uqūd*, p.45.

vendor is then responsible for returning the money paid though he can tell the purchaser about non-refund or partial refund in lieu of the cancellation and the benefit of use enjoyed by the purchaser whilst holding the property. This is known as *al-sharṭ al-jazāʾī* that is a commitment to restitution as a penalty for breach or delay in performance of obligation. Though perceived as an imported rule, Muṣṭafā Zarqāʾ has suggested that such rules has been voiced by classical jurists like Qāḍī Shurayḥ and Ibn Sīrīn.¹⁵⁹ In one article, Nabil Salih posed a valid question whether or not compensation for lost profit and intangible or abstract damage could come under *ḍamān al-ʿaqd*. His reason for questioning so is presumably because such matters were not specifically discussed in classical texts.¹⁶⁰ Having said that, there are avenues for such issues to be reevaluated within the broad premise of *ḍamān* and freedom of contract and making stipulations as allowed by the law. In principle, so long as the terms and conditions are harmonious with the *uṣūl* of the *Sharīʿah*, it should be allowed¹⁶¹ and to be able to cope to the changing business practices and experiences. This also proved the flexibility of Islamic law and its ability to adjust to the changes within human life without loosing its basic characteristics.

In discussing the obligations of the contracting parties, the code is inspired by the classical laws rules that if the goods sold are destroyed prior to delivery or if part of them is lost through the act of the purchaser, he shall be deemed to have taken delivery of the goods sold and he shall be bound to pay the price.¹⁶² Con-

¹⁵⁹*Madkhal*, p.234, 391. However, he does not give references for his claim.

¹⁶⁰Nabil Salih, "Remedies for Breach of Contract under Islamic and Arab Law," *ALQ* [1987], pp.269-289.

¹⁶¹The maxim reads: [*kullu sharṭ yukhālīf uṣūl al-Sharīʿah bāṭil*]. See *Sh.Zarqāʾ*, p.485. Cf. on Islamic thoery of damages, chapter IV, pp.210-213.

¹⁶²UAECC art.532. For details see *Badāʾīʿ*, vol.V, pp.244-246; *Fiqh Islāmī*, vol.IV, pp.418-421; *ʿUqūd*, p.75. See Chapter III, pp.93-96.

trarily, if the goods are destroyed prior to delivery through a cause in which neither of the contracting parties played any part, the sale shall be cancelled and the purchaser shall be entitled to recover the price which he has paid.¹⁶³ Being different from the two preceding situation, article 533(1)(2) rules that : if the goods sold are destroyed prior to delivery through the act of a third party, the purchaser shall have the option as he wishes either to cancel the sale or to affirm it. He shall also have right to recourse against the person who has caused the loss either for equivalent goods or for the value thereof.

Pertaining the shortfall decrement and excess in quantity of the goods which are sold, article 523 provides comprehensive regulations:

" If the contract specifies the quantity of the goods to be sold and it appears that there is a shortfall or an excess in them, then, if there is no provision or custom in that regard, the following rules shall have effect:

[a] if the goods sold would not be harmed by being divided, the excess belongs to the seller, and he may recover the same in specie, and any shortfall is to his account, whether the price is fixed per unit or by measure, or for the whole goods.

[b] If the goods would be harmed by being divided and the price has been fixed by unit or measure, then the excess shall belong to the seller and he shall be entitled to the price thereof and any shortfall shall be to his account. If however a price has been fixed for the goods as a lot, the excess shall belong to the purchaser and there shall be no change in the price if there is a shortfall.

[c] If the excess or shortfall places a greater obligation upon the purchaser than that for which he contracted to purchase or amounts to a different bargain for him, he shall have the option to rescind the contract unless the amount is minimal, and the shortfall does not prejudice the intention of the purchaser.

[d] If the purchaser takes delivery of the goods sold knowing that they are short, he shall lose his right to elect to rescind the contract as referred to in the foregoing paragraph.

¹⁶³UAECC art.531.

i] The Status of Transactions Deemed Void, Invalid and Suspended.

Within the *Shari'ah* and modern legislation alike, void transactions are of no effect and legally non-existent.¹⁶⁴ Consequently, no property right can be transferred and no liabilities are incurred by the purchaser in respect of goods, regardless of whether he has taken possession of them with the consent of the purchaser. The void transaction cannot be validated, ratified or amended by approval of the parties or by the passage of time.¹⁶⁵ The UAE code also ruled that if the void part is separately specified or if only a part is dependent upon the grant of consent which has not been given, these parts may be severable.¹⁶⁶

There is a potential problem that might arise from such situation, that is the destruction of the goods. In cases of ruination of the property, it is the vendor who bears the cost or loss in void sales. It was generally held by the classical jurists that upon deeming nullity of contract once seisin has passed to the purchaser, the object becomes a trust in the hand of the purchaser. The purchaser is not empowered to perform any act in respect of the object of sale and it is as if he merely retains

¹⁶⁴*Maj. Adliyyah*, art.370 reads : A sale which is void is of no effect whatsoever. Consequently, if in the case of a sale which is void, the purchaser has taken delivery of the thing sold with the permission of the vendor, and such thing is destroyed without the fault of the purchaser while in his possession, there is no necessity for the purchaser to make good the loss, the thing sold being in the nature of a thing deposited on trust. See *Civil*, p.85; *Maṣādir*, vol.IV, p.145 ff. Cf. Chapter III, pp.95-98.

¹⁶⁵UAECC art.201 (1) reads: A void contract is one which is unlawful in its essence and form, lacking the elements of a contract or defective in its subject matter or purpose or form as laid down by law for the making of the contract and such a contract shall be of no effect and shall not be capable of being rectified by consent. Art.210(2) rules that any person having an interest may rely on the voidness of the contract and a judge may so rule of his own motion. Art.210(3) provides that no claim (for a declaration) that a contract is void shall be heard after the expiry of 15 years from the date the contract was made, but any person having an interest may raise the defence of the voidness of the contract at any time.

¹⁶⁶UAECC art.211(1)(2).

seisin with the consent of the vendor. Therefore, should the object perish whilst in his possession, he is not liable.¹⁶⁷

The general rule is that a voidable contract can be validated through ratification by the interested party. The majority opinion rules that in such a transaction, when the purchaser has taken possession of the goods with the consent of the vendor where both goods and consideration constitute property, the right of ownership of these goods transfers to the purchaser. He is then responsible for the loss or damage to the goods while these were in his possession.¹⁶⁸ The right of property which devolves from an invalid sale nevertheless remains weak and is dependent upon the transfer of possession to have any effect. It stands to reason that right of ownership should not be transferred before possession, in order for the invalid circumstances to be removed.¹⁶⁹

The invalid contract may be annulled by either party prior to the transfer of the object. Whilst the invalidating factor remains, the contract may also be annulled by either party after seisin. Where the contract is not binding (*ghayr lāzim*), subject to the right of option, the person who has the right of option may annul an invalid contract.¹⁷⁰ The UAE law provides that the right to grant or withhold consent to the contract shall be that of the owner or the person in whose favour the right over the thing contracted for exists, or in the tutor or guardian, or in the person of defective capacity after the defect has been remedied or the person who has suf-

¹⁶⁷See *Maj. 'Adliyyah*, art.370, *supra*.

¹⁶⁸UAECC art.212(1) reads: A voidable contract is one which is lawful in its essence but not in form, and if the cause of the voidability is removed, the contract shall be valid. Also see Saba Habachy, "The System of Nullities in Muslim Law", *AJCL* 13 (1964), p.62.

¹⁶⁹UAECC art.212(2).

¹⁷⁰*Maj. 'Adliyyah*, art.376 : In the case of a revocable sale, a person possessing an option can cancel such sale.

ferred duress after the the duress has been removed, or such person to whom the law gives that power.¹⁷¹

A suspended contract (*bay' mawqūf*) has a beneficial effect only after approval has been given by a relevant party. If consent is given to a suspended transaction, it shall become effective retroactively to the time it was made, and the subsequent consent shall have the same effect as a prior agency [approval]. If consent is refused, the disposition shall be void.¹⁷²

j] Restitutions for Defects.

Restitution regarding defects usually refers to default in ownership and imperfection of the goods themselves. This is because the seller is obliged to ensure that the goods sold are free from the right of any third party who may object to the purchaser if the cause of that third party[']s right antedates the contract of sale.¹⁷³ The vendor shall also ensure that the goods sold are free of any third party right if such a right is based on a cause arising before the sale out of his act.¹⁷⁴

¹⁷¹UAECC art.214.

¹⁷²UAECC art.217(1)(2).

¹⁷³UAECC art.534(1).Cf. *Maj. 'Adliyyah*, art.616 on *al-kafālah bi 'l-darak*, supra. See also *Murshid*, art.491. Al-Zuhaylī commented that the basis for *damān* in such situation is that there is a flaw in the transaction as the vendor is disposing something which he is not a rightful owner. The property can also be subjected to a firm established right (*ḥaqq muqarrar thābit*) and he is thus liable to the purchaser and has to pay *damān*. In certain circumstances, the purchaser can demand, in ensuring discharge of the liability, a guarantor (*kaftl*) from the vendor....See *'Uqūd*, p.83 and Chapter III, pp.102-105.

¹⁷⁴UAECC art.534(2).

If judgement is passed affirming a third party[’s] right over the goods sold, such a third party may have recourse against the vendor for the price if he affirms the sale, and the goods sold shall then belong exclusively to the purchaser.¹⁷⁵ If the third party does not affirm the sale, the contract shall be cancelled and the purchaser may have recourse against the vendor for the price.¹⁷⁶ The vendor shall compensate the purchaser for any useful improvement in the goods sold made by the latter calculated on the value thereof on the day of delivery to the third party claimant.¹⁷⁷ The vendor shall likewise make good to the purchaser any loss out of the third party claim to the goods sold.¹⁷⁸

The law has also outlined the procedure of such situation as enshrined in article 535. If the third party is claiming his right over the goods sold prior to delivery thereof, he must direct such a claim against both the vendor and the purchaser. If the claim is brought after delivery of the goods sold and the purchaser does not joint the vendor in the action at the appropriate time and a judgement is issued against him which becomes final, he shall lose his right of recourse for an indemnity if the seller proves that if he had been joined in the action the result would have been the dismissal of the third party’s claim of right.¹⁷⁹

Regarding the question of latent defect in the goods, articles 543-555 spells out the vendor’s liability. He is legally duty bound to guarantee that the goods sold

¹⁷⁵UAECC art.536(1).

¹⁷⁶UAECC art.536(2).

¹⁷⁷UAECC art.534(3).

¹⁷⁸UAECC art.536(4).

¹⁷⁹UAECC art.535(1)(2).

are free from any defect, save such as are within the customary tolerance.¹⁸⁰ This provision clearly recognizes the role of custom in determining the remitted defect and upholding the threshold of Islamic business ethics demonstrated in condemnation of concealment of defects and fraudulent practices. For instance, in determining *‘ayb*, custom of the traders (*‘urf al-tujjār*) is used to assess the reduction of price as a result of the deficiency of the goods from their original nature (*aṣl al-fiṭrah al-salīmah*).¹⁸¹

The vendor shall be exempted from liability for *‘ayb* in the goods sold in certain situations:

- [a] If the vendor disclosed the defect to the purchaser at the time of the sale;
- [b] If the purchaser accepted the defect after he had seen it or after learning thereof from another person;
- [c] If the purchaser purchases the goods with knowledge of the defect therein;
- [d] If the vendor sells the goods with a condition that he is not to be liable for any defect therein, or for a specified defect, unless the vendor deliberately conceals the defect or if the purchaser is prevented from seeing the defect;

¹⁸⁰UAECC art.543(1). This general rule relating to the option of defects shall apply not only to contract of sale but also to all contracts involving devolution of ownership, particularly that known as *‘uqūd al-mu‘āwadhāt* (commutative contracts). See *‘Uqūd*, p.86. The conditions of *ḍamān al-‘uyūb* are : [1] it must be antecedent (*qadīm*); [2] the antecedent defect must be latent; [3] the buyer is ignorant about the defect.

¹⁸¹*‘Uqūd*, p.89. Coulson observes that: trade is permitted and implied conditions of merchantability of the goods (suitability of the property or service for the proposed declared intention in a contract). Arising therefrom is a warranty against defect in the goods sold. The consequence of such practice is that every vendor, hirer or contractor of services has a duty to disclose any defects, faults or unsuitability of the goods for their declared intended purpose. See *Commercial*, p.65.

[e] If the sale is by public auction by the judicial or administrative authorities.¹⁸²

There are certain situations where recourse for defect is hindered and payment of *ḍamān* is waived. This happens when the purchaser assented the defect after knowing it by either express or implicit statement¹⁸³, when the purchaser has utilized the goods like a rightful owner after realizing the defect and thus losing his right of option¹⁸⁴, when the goods are destroyed in the hands of the purchaser or he has consumed them before knowing about the defect¹⁸⁵, when a new defect occurs¹⁸⁶ and when there is an increase in the goods¹⁸⁷.

k] The Islamic System of Option.

The Islamic system of *khiyār* creates the power of unilateral rescission of the contract under condition of vitiated consent. A party who had mistakenly entered into or who has been unfairly or unwittingly forced or tricked into entering a contract, was provided with a remedy against the effect of such a contract. The victims of mistake, fraud or deceit, who are unaware of that fraud or deceit at the time of the contract would, in all prospect, have refrained from entering into that contract had they indeed known of the discrepant factors. In three circumstances,

¹⁸²UAECC art.545. As far as the sale by auction is concerned, it is suggested that the vendors who enjoy such an exemption should not be restricted to the two bodies only.

¹⁸³UAECC art.554.

¹⁸⁴UAECC art.546.

¹⁸⁵UAECC art.547.

¹⁸⁶UAECC art.548

¹⁸⁷UAECC art.549.

the contract becomes voidable (*qābil li 'l-ibṭāl*) with the right to avoid given to the contracting parties whose consent is vitiated.¹⁸⁸

Article 193 of the UAE code reads that: “No regard shall be had for any mistake save in so far as it is contained in the form of contract or demonstrated by the surrounding circumstances and conditions, or the nature of things or custom.” In this respect, it may be said that the law will recognize technical errors of the contract and obvious mistakes in the deduction of the parties’ will and inferred intention. Rayner observes that modern Islamic legislation does not go beyond this and thus marked the approach of the UAE code towards the more restrictive bounds of Western Civil systems.

Mistake (*ghalaṭ*), which is a false and inexact representation of reality, may be made in regard to different elements of a contract like substance¹⁸⁹, quality¹⁹⁰ and the contracting parties. It is regarded the least among the impediments of contract despite the fact that it is the most conducive factor to dispute.¹⁹¹ Another evidence to support this contention is the fact that *khiyār ghalaṭ* does not strictly exist in Islamic jurisprudence.¹⁹²

Islamic law generally recognizes mistake as to value in conjunction with flagrant misrepresentation (*ghubn fāḥish*)¹⁹³. In such a practice, there is an excessive deception without fraud in the transaction. The provision of legislative

¹⁸⁸See discussion of contractual warranty in chapter III, supra., pp.90-112.

¹⁸⁹Attributed to *ghalaṭ al-ma'nā*.

¹⁹⁰Normally results in losing the intended features (*fawāt al-waṣf al-marghūb*).

¹⁹¹*Maṣādir*, vol.II, p.112.

¹⁹²*Commercial*, p.107.

¹⁹³Cf.*Maj. 'Adliyyah*, arts.356-357.

welfare for vulnerable institutions has been taken up in the UAE code. Article 191 reads: "When a contract may not generally be cancelled on the basis of *ghubn fāhish* without the accompaniment of misrepresentation (*taghrīr*), contracts in respect of property belonging to person under interdiction, waqf and state may be so cancelled." The code also provides that where exploitation or conspiracy has been exerted in dispositions of property of subsequently restricted persons, the judge may void the contract despite the fact that the dispositions were made prior to the court's restriction.

As regards to fraud, article 185 provides that *taghrīr* is when one of the contracting parties deceives the other by means of trickery of word or deed which leads the other to consent to what he would not otherwise have consented to.¹⁹⁴ Provision on this issue reflects a wide concept of *fiqh* being adopted. For instance it is provided that deliberate silence concerning a fact or set of circumstances shall be deemed to be a misrepresentation if it is proved that the person misled thereby would not have made the contract had he been aware of the fact or set of circumstances.¹⁹⁵ And if one of the contracting parties makes a misrepresentation to the other and transpires that the contract was concluded by a gross cheat, the person so misled may cancel the contract.¹⁹⁶

The UAE code also recognizes the specific trust sale contracts like *murābahah*, *tawliyah*, *wadī'ah* and *ishrāk*. In these transactions, as in *fiqh* texts, the original cost price paid by the seller must be disclosed by him in addition to the

¹⁹⁴The UAE provision is taken from the Jordanian Civil Code article 143 where both codes are employing the term "*taghrīr*" unlike the Kuwaiti code which uses the term "*tadlīs*".

¹⁹⁵UAECC art.186.

¹⁹⁶UAECC art.187.

profit percentage or the rebate percentage, as the case may be. If it is later established that the price paid by the seller is less than what disclosed, the buyer need only to pay the real price.¹⁹⁷ The UAE law also provides that where the original cost price is not known at the time of the contract, the purchaser is given option to rescind the contract when he learns of it.¹⁹⁸ He shall also have the option to rescind if he learns that the seller conceals a matter affecting the object or the capital value, but he loses this right, if he converts, consumes or disposes of the goods after delivery.¹⁹⁹

II] Unfair Competition.

In defining the concept of *māl mutaqqawwim*, the code has extended its meaning by including not only specific property²⁰⁰ but also to usufructuary rights (*manāfiʿ*) and other rights in property such as a debt attached to the *dhimmah* of a person, right of easement (*ḥuqūq al-irtifāq*) as well as the industrial and intellectual property (*ḥaqq al-adabī*).²⁰¹ Such development has paved the way to the passing of

¹⁹⁷UAECC art.506(1)(2).

¹⁹⁸UAECC art.506(3).

¹⁹⁹UAECC art.506(3).

²⁰⁰This will also include any tangible material (*ashyāʾ māddiyyah*) proclaimed as legitimate according to the *Sharīʿah*. See *Maj.ʿAdliyyah*, art.127.

²⁰¹UAECC art.200. According to article 121 of the Provisional Constitution of the UAE, the Federation is granted exclusive authority over the most important areas of codification (*al-tashrīʿāt al-kubrā*) such as civil and commercial law (*muʿāmalāt madaniyyah wa tijāriyah*) and over the protection of industrial property and copyright law (*ḥimāyat al-milkiyyah al-ṣināʿiyyah wa ḥuqūq al-muʿallifīn*). See Nasrallah Mangalo, "Trademark and Unfair Competition Law in the United Arab Emirates," *IIC* 13 [1982], p.596. Also see Irshad Abdul Kadir, "Trademark Protection in the UAE," *ALQ* [1991], pp.31-47. In this article the author had listed the relevant statute laws in trademark protection. They are : (a) Ras al-Khaimah Trademark Law 1974; (b) Abu Dhabi Torts Law 1966; (c) Abu Dhabi Penal Code 1971; (d) Abu Dhabi Commercial Register Law 1973; (e) Federal Commercial Law 1975; (f) Suppression of of Fraud and Deceit in Commercial Transactions (Federal Law No.4 1979); (g) Commercial Agency Law (Federal Law 1981 and (h) Federal Penal Code 1987.

new federal law on trade mark and copyright recently²⁰², after it has being felt as a "notable absence" except in the rarely-invoked trademark law of Ras al-Khaimah.²⁰³

It was argued by Mangalo that such development was influenced by the Egyptian law, based on their experiences and case law. For instance, in the case of *Thani Ben Murshid v. al-Nawis Company*²⁰⁴, the plaintiff was an agent for a Dutch company producing a well-known canned-milk under the trademark "Rainbow". The defendant company imported for sale an inferior product called "Rainshow". The plaintiff company sued to stop this practice. The court in Abu Dhabi looked at Abu Dhabi law first, and only when the answer could not be obtained did it look to Islamic law generally and the laws of other Arab countries. In this case, the judge has referred to the Egyptian decision in 1950 that infringement was a form of unfair competition. It was important for the state to protect the consumers from false and possibly dangerous consumer goods. This approach was later developed in *McDonalds Company v. Arzūni*.²⁰⁵

²⁰²Law 37/92 concerning Trademark; Law 40/92 concerning protection of intellectual work; Law 44/92 concerning regulation and protection of industrial ownership, patent, industrial drawings and prototypes. See W.M.Ballantyne, *Register of Law in the Arabian Gulf* [9th edition], 1993, p.342. In his article Irshad Abdul Kadir also suggested the additional measures in addressing the trademark infringement and unfair competition. This include local licensing procedure, administrative intervention, cautionary notice and international agreement. Op.cit, pp.37-38.

²⁰³Ras al-Khaimah Trade Mark Law 1974. For details see Nasrallah Mangalo, Ibid., pp.588-625. See also Ian Edge, "Comparative Commercial Law of Egypt and the Arabian Gulf," *Cleveland State Law Review* 34 [1985/6], pp.142.

²⁰⁴Abu Dhabi Civil Court decision 1973 in *IIC* [1981], pp.883-890 and 891-892. See Ian Edge, *ibid.*

²⁰⁵See also judgements of *Pif Paf* Civil Suit 166/79 [1982]DCC; *Prophecy and Cachet* [1982] DCC; *Brylcream* Civil Suit 1378/77 [1982] DCC. Details of these cases and other cases has been supplied by Mohamed Osman Abdalla el-Saeid, *Aspect of Banking Law and Legal Practice in Light of the Commercial Code of the U.A.E.*, Unpublished Ph.D Exeter University, 1990.

In other matters, the UAE courts have preferred to refer to general principle or to Islamic law rather than directly to Egyptian law. Certain UAE courts, particularly those of Dubai, have considered the validity of shipping contracts (bills of lading and charterparties) which refer to foreign choice of law and which contain limitation of liability of the shipowner based on Hague Rules. This has given rise to two related questions, about the applicability of foreign choice of law clauses in contracts to be performed in the UAE and the validity of such exemption clauses in UAE law. Neither question has been legislated in the UAE since it is not a party to the Hague Rules. In these cases, the courts apply the general principle of contract.²⁰⁶

"The requirement in article 5 of the Code Of Civil Procedure of Abu Dhabi to follow Islamic jurisprudence in their decision granting trademark protection under unfair competition has not yet resulted in applying provision of Islamic law or even judge-made law based on Islamic legal theory (*fiqh*). The courts have instead found a basis for trademark protection in the principle of equity (*'adālah*) and justice (*inṣāf*) embodied in the *Shari'ah*."²⁰⁷

It was perceived that if Islamic law is to be directly applied for purposes of trademark protection under unfair competition, a more detailed consideration of application of such law by the court would be necessary. Trademark and unfair competition law is not an express part of Islamic law. However, trademark protection and unfair competition law, as elements of industrial property law (*milkiyyah ṣinā'iyyah*) can be compared in general to private property (*milkiyyah khāṣṣah*) under Islamic Property law²⁰⁸ and the use of such property (*intifā'; istighlāl*) and promotes economic freedom (*ḥurriyat al-tijārah wa 'l-*

²⁰⁶Ian Edge, *ibid.*, pp.142-143.

²⁰⁷Nasrallah Mangalo, *ibid.*, p.611.

²⁰⁸*Maṣādir*, vol.II, p.23. See also M.Yusuf Mūsa, *al-Amwāl wa Naẓariyyat al-'Aqd fī 'l-Fiqh al-Islāmī*, p.159.

ṣināʿah) and thus free competition (*munāfasah mashrūʿah*). The specific ground rules of unfair competition law follow from this principle and are supported by theories developed in Islamic law such as misuse of rights (*taʿassuf bi ʿl-ḥaqq*),²⁰⁹ unlawful conduct (*ʿamal ḡhayr mashrūʿ*)²¹⁰ and the rule of restitution (*ḍamān*).²¹¹

Mangalo further stressed that the general expression on unfair competition could be found in the Islamic view of damaging conduct (*fiʿl ḍār*), according to which a person causing damage (*musabbib*) must repair or make for the damage (*taʿwīd al-ḍarar*).²¹² An act of unfair competition is in its nature merely a form of damaging conduct and should be regarded as illegal conduct. The unauthorized use of another's distinctive and already used mark impairs his property rights in his enterprise and thus creates liability under the rules relating to damaging conduct, which has its root from the classical principles on *ḍamān*.

However, it should be understood that the United Arab Emirates Civil Code represents an effort at reevaluating the role of Islamic law *vis-a-vis* modern legislation. It is an attempt towards harmonizing the existing laws based on European civil law as well as English common law with Islamic legal precepts. Such an approach has been the basis of earlier attempts in Egypt, Syria, Iraq and Jordan.

²⁰⁹UAECC art.106 reads: (1) A person shall be held liable for an unlawful exercise of his rights. (2) The exercise of a right shall be unlawful [a] if there is an intentional infringement of another's right; [b] if the interests which such exercise of right is designed to bring about are contrary to the rules of Islamic *Shariʿah*, the law, public order or morals; [c] if the interests desired are disproportionate to the harm that will be suffered by others; [d] or if it exceeds the bound of usage and custom. For detail treatment on the subject on a comparative basis between Islamic law and modern Arab laws see Fathī al-Dārīnī, *Nazariyyat al-Taʿassuf fi Istiʿmāl al-Ḥaqq*, 1967.

²¹⁰N.Mangalo, op.cit., p.612.

²¹¹See chapter III, *supra*.

²¹²See *al-Mudhākīrāt al-Idāhiyah li ʿl-Qānūn al-Madanī al-Urdūnī* [Explanatory Notes on Jordanian Civil Code] edited by Niqābah al-Muḥāmin, al-Maktab al-Fannī [Lawyers Chambers' Technical Office], 1976 Art.256-271 cited in Mangalo, *ibid*.

However, this pragmatic approach evolving as it did out of various factors like political negotiations, social reality and the legal history of the country, was faced with the fact that these were not always in conformity with Islamic law as it had earlier been perceived. This has led to an attempt by modernising Islamic jurists to reconsider aspects of received legal doctrines to make them conform with Western precepts that could be considered to be within the realms of equity. When Sudan attempted to impose an Islamic code based on traditional values uninterpreted by modern Western concepts, the result was not altogether successful. However, the attempted harmonisation present in the UAE code seems to have been more acceptable to modern jurists as well as opening the way for a more modern understanding of the classical Islamic concepts.

Conclusion

From the survey in this chapter, it can be established that there has been a trend towards Islamization of the laws in the Muslim countries or in other words to harmonize Islamic and modern commercial laws. A comparative studies of the two systems and finding the viable ways of bridging the Islamic and modern jurists is a meritorious effort and should be further enhanced. Certain legal problems which have no direct rulings in the classical texts should be resolved by the intensified *ijtihād* exercises. In addition, presenting Islamic *fiqh* in its new form (*al-fiqh fi thawbiḥ al-jadīd*) is essential in providing the legal practitioners, especially those who have no direct access to classical Arabic, to the laws governing commercial transactions.

CONCLUSIONS.

The concept which represents the *Sharī‘ah*’s notion of general liability and preservation of legitimate rights, namely *ḍamān*, was used interchangeably with similar terms in the various contexts whenever it was deemed appropriate. The Qur’anic evidence for *ḍamān* exists despite the fact that the term itself never occurs in it. The most celebrated verse cited in almost all manuals of Islamic law is: “For him who produces it, is the reward of a camel load, I will be responsible for it.” This is appropriate if *ḍamān* was only applied to the notion of *kafālah*. However, as the research was not confined to *ḍamān* in the sense of suretyship but also to remedies in contractual relationships, a reassessment of the evidence from the Qur’ān is inevitable. Thus, verses on the significance of responsibility (*mas’ūliyyah*), retributive justice (*jazā’*) and prohibitions of violation of rights and inflicting mischief, have been given attention thus providing the discussion on such an important matter with stronger textual injunctions.

As far as the sunnah was concerned, the research found that some writers have confined their elucidation of *ḍamān* to the celebrated Prophetic saying which was later adopted as an important maxim: “no harm shall be inflicted nor should any be inflicted on a reciprocal basis.” Most classical jurists recommended that the whole body of Prophetic statements and decisions were appropriate to explain the way *ḍamān* should be applied. In turn, decisions on the issue attributed to the Companions, where no earlier precedents from the Prophet’s time existed, became another step in the development of the concept. It was further developed by scholars and jurists of later generations.

In many aspects, *ḍamān* as a classical concept of Islamic law is still relevant to commercial life and worthy of being incorporated in modern commercial legislation. However, the concept needs to be restated, without losing its original essence, in the language and context of modern commerce. This restatement is crucial in order to make the concept of *ḍamān* fit easily into the complexity of commercial techniques in modern days, particularly so as the classical manuals are normally confined to issues faced during the time they were prepared. Such an effort is important to ensure that maximum benefit can be attained from the rich Muslim intellectual heritage and these concepts can be applied in the present time. In this respect, the ideal way to study an aspect of commercial law like *ḍamān* would be to compare the legal principles embodied in the manuals with the materials relating to its application in economic life as manifested by actual contracts, business records as well as the *fatāwā* of the jurists in response to any new cases arising in the society.

As regards the usage of *ḍamān* in the sense of suretyship, the research found that it was, and still is, an important means of security when involving loan transactions. However, personal suretyship is only sufficient to secure loans involving a small amount. In loan agreements involving large amounts, collateral security represented by the practice of *rahn* is needed. This would be further enhanced with the full utilization of written documents and their being witnessed by notaries. In light of *maṣlaḥah*, documentation of contracts is seen as an absolute necessity despite the general attitude of Islamic scholars in treating it as mere recommendation. In practice, the use of written instruments in establishing contractual obligations and legal entitlements has gained some prominence and given

rise to a distinct branch of legal science, that is the *shurūṭ* literature. The scope of *ḍamān* has been enlarged by modern jurists, basing themselves at least theoretically on the classical jurists, to encompass the Islamic perspective of bankruptcy and the usage of *ḍamān* in the form of negotiable instruments. Thus, this Islamic concept has shown viability and vitality in the changing milieu.

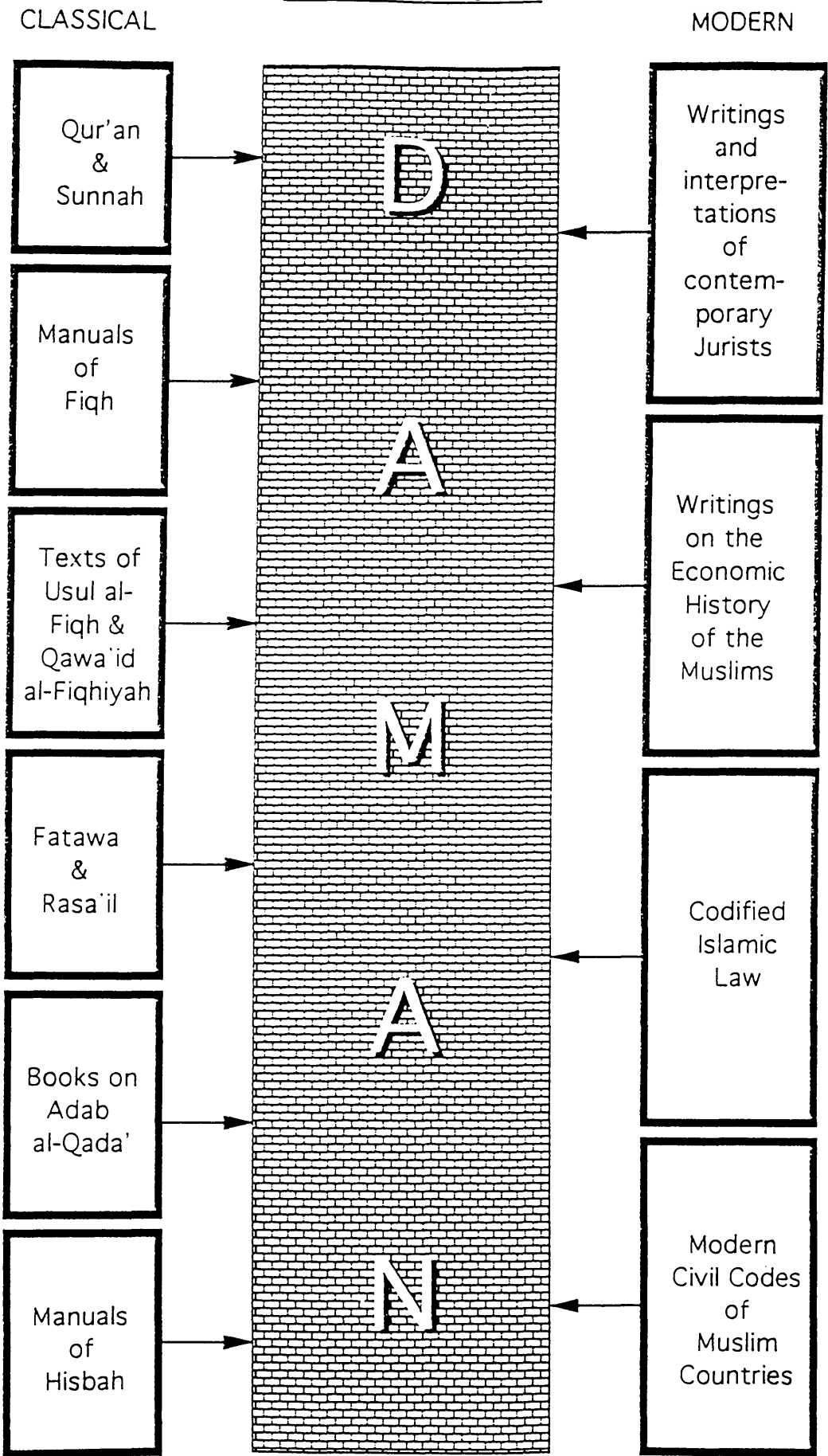
Modern developments have also been able to adapt the way the concept of *ḍamān* was applied to serve as remedies to contractual injustice. *Ḍamān* is considered as “implied terms” inherent in any concluded contract by which it spells out the rights and obligations of the contracting parties. This serves as a protection against any infringement that might take place. Another modern aspect is *ḍamān* in fiduciary relationship where liability will only arise when transgression is committed. There are certain contracts whereby both elements are material. These arrangements are vital in regulating business activities and the extensive study of them has provided the theoretical foundation for a distinct law of fair trading and consumer protection law.

The developing concept of *ḍamān* is exemplified by the operation of the Malaysian Islamic Bank. Despite the fact that the Malaysian Islamic Banking Act 1983 is merely a super-imposition of some Islamic prescriptions on the Banking Act 1973, it is the beginning of an era of looking into the importance of *mu‘āmalāt* rules in banking. However, there is a need for better legislation to harmonise detailed substantive laws within the framework of Islamic law.

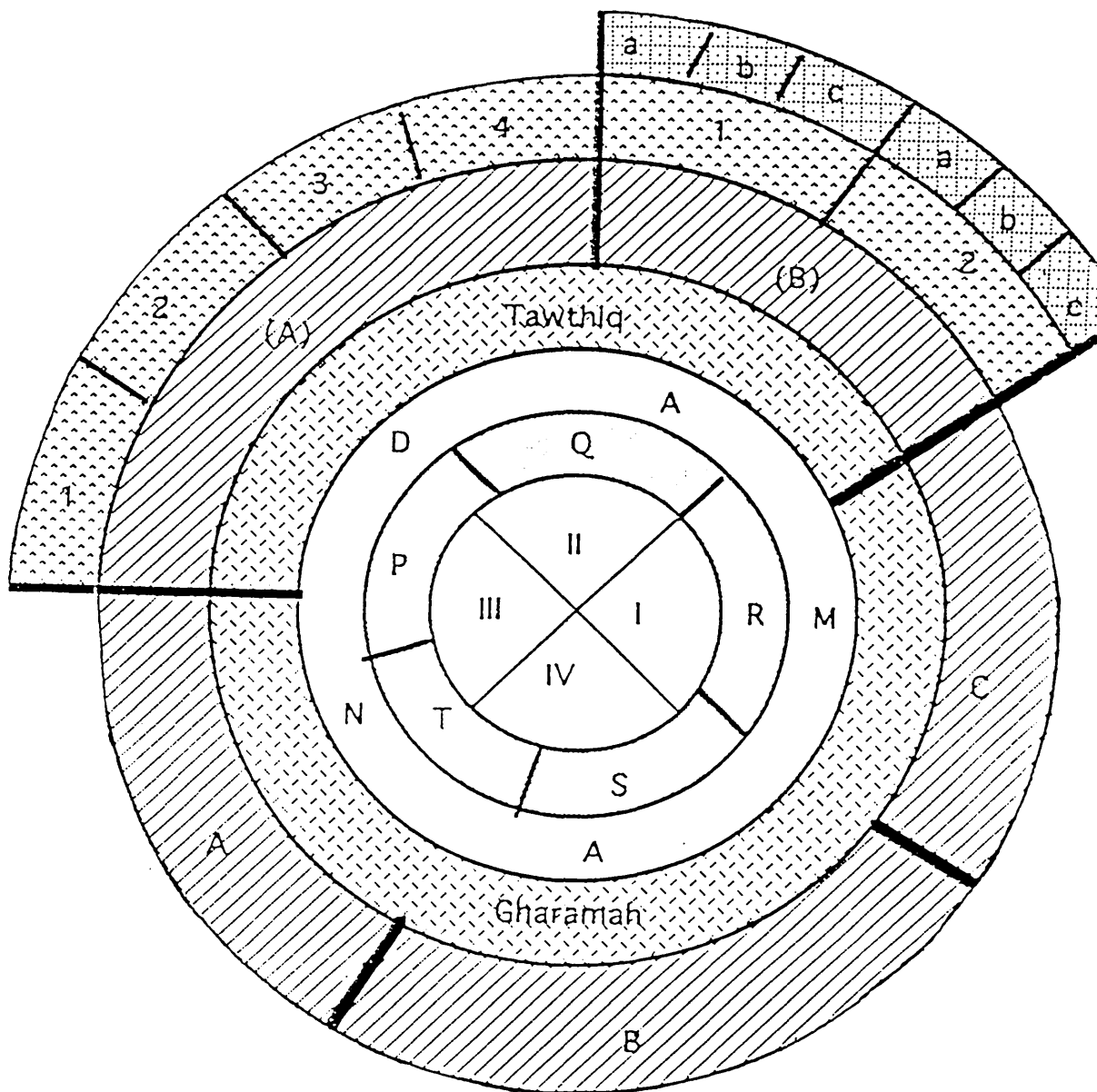
The assessment of the trend of legislation in the Middle East, particularly that of the UAE provided the evidence of the continuing process of the reassertion

of the *Sharī'ah* within the context of harmonization with the existing secular legislation. This is providing a challenge to Muslim jurists and has proved to be the most effective approach thus far. The *Sharī'ah* and modern law need an effective interaction, as far as promulgation of new laws is concerned. This relationship between the *Sharī'ah* and modern law is described by William Ballantyne as "an irresistible force against an irremovable object." However, as the thesis has indicated there are considerable possibilities of recociling the *Sharī'ah* with modern equitable legislation. *Ḍamān* is an area of particular importance in this respect.

Literature Review



THE CONCEPT AND APPLICATION OF DAMĀN IN ISLAMIC COMMERCIAL LAW.



KEYS:

Legal foundations of damān

- I. *al-maqāṣid al-shar'iyyah*.
- II. *lā ḍarar wa lā ḍirār*.
- III. *ḥurmat al-milkiyyah*.
- IV. *ḥurriyat al-ta'āqud*.

Grounds of damān:

- P. Contract (*'aqd*).
- Q. Possession (*waḍ' al-yadd*).
- R. Destruction (*itlāf*).
- S. Blockade (*ḥaylūlah*).
- T. Deception (*ghurūr*).

Methods of security (tawthiq):

(A) Other methods of security:

1. Pledge (*rahn*).
2. Assignment of debt (*ḥawālah*).
3. Documentation of contracts (*kitābah*).
4. Function of notaries (*shahādah*).

(B) Kafālah:

1. Conventional usage.
 - a. Suretyship for person (*al-kafālah bi 'l-nafs*).
 - b. Suretyship for claim (*al-kafālah bi 'l-māl*).
 - c. Guarantee for fault of ownership (*al-kafālah bi 'l-darak*).
2. Use of kafālah in new transactions:
 - a. Bill of exchange (*sufṭajah; kambialah*).
 - b. Letter of guarantee (*khitāb al-damān*).
 - c. Letter of credit (*al-i'timād al-mustanādī*) etc.

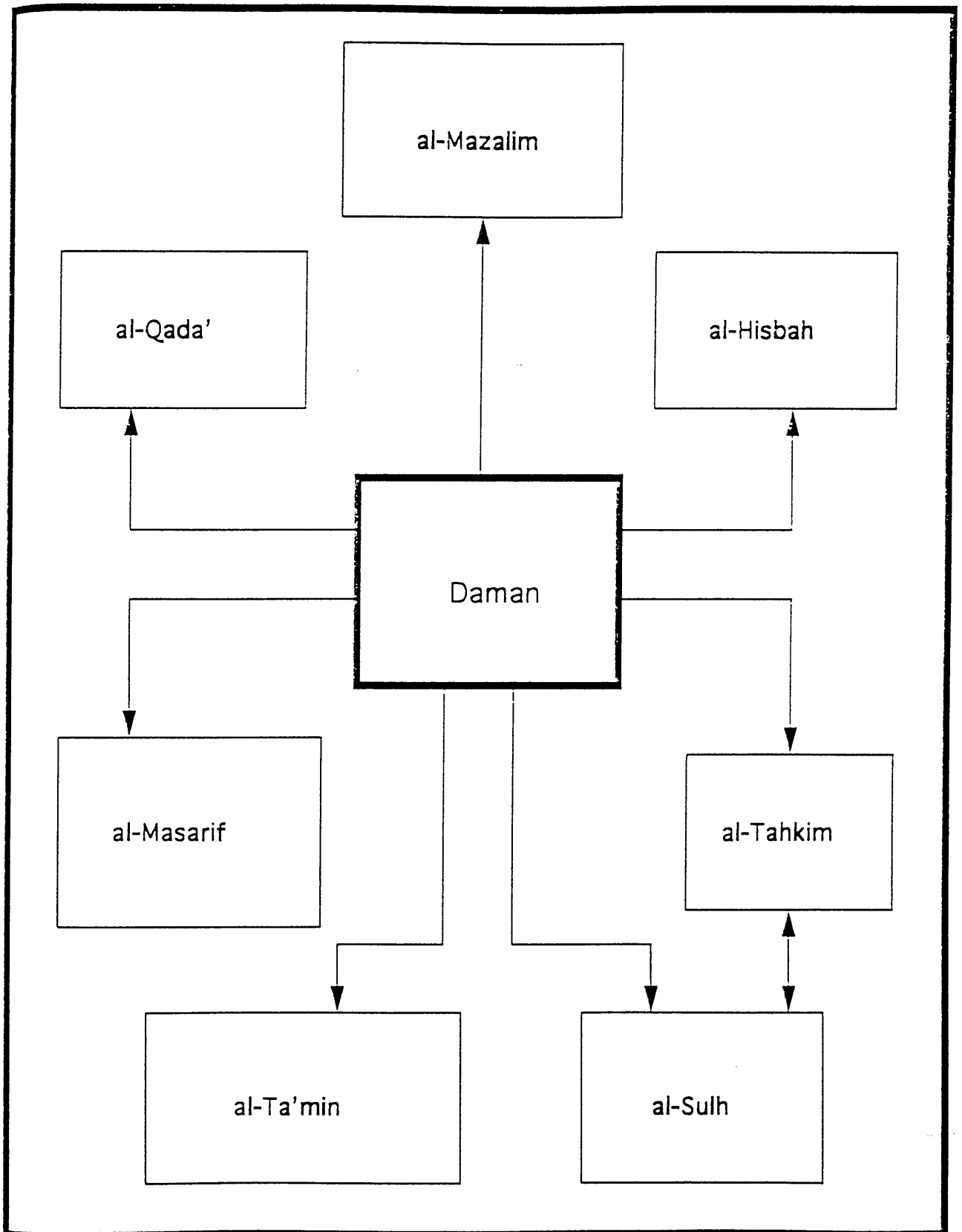
Damān in the sense of gharāmah:

A. *'Aqd damān* wherein *damān* is treated as contractual warranty mainly based on contract of sale - right of option, rescission, reparation.

B. Contract of fidelity where *damān* arises if the trust is breached.

C. Contracts with both elements - guarantee and trust.

The Application of Daman in various institution



GLOSSARY.

This list is developed based on Joseph Schacht's *An Introduction to Islamic Law*, to which most of the English equivalent terms are taken. However, some necessary additions and variations of meaning are duly made, to suit the present work. An addition symbol [+] is used against mark new terms added. An asterisk [*] is used against variant terms from Schacht. A slight difference is marked with [#].

#adab al-qāḍī: special works on duties of the qāḍī.

#‘adl : good character; trustee to hold the pledge.

#ahliyyah : legal capacity.

ajīr : hired worker.

+ajīr khāṣṣ : an employee.

+ajīr mushtarak: professional artisan.

ajr : wage; remuneration.

‘aqd : contract.

‘āqil : sane.

amānah : trust; fiduciary relationship.

***aman** : protection; safeguard; safety.

‘āmil al-sūq: inspector of the market.

amīn : a person in the position of trust.

‘āriyyah : loan of non-fungible things.

aṣīl : the principal; principal debtor.

aṣl : the nature of a transaction.

‘ayn : thing; substance.

badal : consideration.

+barā’ah : exemption.

bāṭil : invalid; null and void.

bāṭin : the ‘inward’ state.

bay‘ : sale; exchange.

bayyinah : evidence.

- dā'in** : creditor.
- dallas** : to conceal a fault or defect.
- #damān** : liability; warranty; guarantee.
- dāmin** : liable.
- +darar** : injury; damage; loss.
- darak** : default in ownership.
- da'wā** : claim; lawsuit.
- dayn** : debt; claim; obligation.
- #dhimmah** : engagement; undertaking; obligation; care as a duty of conscience.
- dhukr** : written document.
- dhu al-yadd** : possessor.
- fāsid** : defective; voidable.
- fatwā** : the considered legal opinion of a muftī.
- fuḍūlī** : unauthorized agent.
- furū'** : branches of positive law.
- +gharāmah** : fine; redress; restitution.
- gharar** : risk; hazard; uncertainty.
- ghallah** : proceed.
- ghaṣb** : usurpation.
- +ghubn fāḥish**: grave deception; fraud.
- +ghunm** : to gain; profit; advantage; benefit.
- +ghurm** : to suffer loss.
- +ghurūr** : deception.
- ghayr ma'lūm**: not known.
- #ḥabs** : retention of a thing in order to secure a claim; lien.
- ḥajr** : interdiction.
- ḥakam** : arbitrator.
- +halāk** : destruction; damage.
- +ḥaqq** : right.
- ḥaqq ādamī** : private claim.
- #ḥaqq Allāh** : right of God (public interest).
- #hawālah** : transfer of debt or obligation.
- +ḥaylūlah** : blockade.

- ḥirz** : custody (of things).
#ḥisbah : the enforcement authority.
ḥiyal : legal device; evasions.
ibrā' : acquittance; release [from liability].
īfā' : fulfilment (of an obligation).
+iflās : insolvency; bankruptcy.
iḥtiyāṭ : (religious) precaution.
ījāb : offer (as a constitutive element of contract).
#ijārah : hire; lease.
ijmā' : consensus.
#ijtihād : independant judgement; interpretation.
+iltizām : liability; responsibility; undertaking.
iqālah : reversal (of a sale).
iqrār : acknowledgement; confession.
ishtirāk : joint ownership.
isqāṭ : relinquishment (of a claim).
istīfā' : receiving (taking possession).
istighlāl : acquisition of proceeds.
istiḥqāq : vindication.
#istiḥsān : juristic preference; equity.
istirdād : vindication.
#istiṣhāb : presumption of continuance.
istiṣlāḥ : taking the public interest into account.
istiṣnā' : contract of manufacture.
#'iwaḍ : countervalue; compensation.
#jā'iz : allowed; permitted.
#ju'l : reward.
qabḍ : taking possession.
qabūl : acceptance.
+qaḍā' : ordinary qāḍī court.
_____ : payment (of debt).
#qāḍī : a judge.
kafālah : suretyship.
kafil : surety; guarantor.

- qarḍ** : loan of fungible objects for consumption.
- qawā'id** : 'rules'; the technical principle of positive law; subject of special works.
- #khiyār** : right of option; right of rescission.
- khuṣūmah** : litigation.
- qīmah** : value.
- lāzim** : binding.
- #māl** : property.
- manfa'ah** : proceed; usufruct.
- #mashrū'** : legally recognized.
- +maṣārif** : banking and financial houses.
- maṣlahah** : the public interest.
- #ma'tūh** : imbecile.
- milk** : ownership.
- mithl** : just means; average; fair.
- mu'āmalāt** : pecuniary transaction.
- +mu'āwaḍah** : commutative contract.
- #muḍārabah** : commenda; dormant partnership.
- mudda'ā alayh**:defendant.
- mudda'ī** : claimant; plaintiff.
- mufāwāḍah** : unlimited mercantile partnership
- +mufliṣ** : a bankrupt.
- +muqāwalah** : contract of work.
- murābahah** : resale with a stated profit.
- +murūr al-zaman**: lapse of time.
- +muṭālabah** : demand; claim.
- muwakkil** : the principal (as opposed the agent).
- muwālat** : contract of clientship.
- #muzāra'ah** : contract of sharecropping.
- nāfidh** : operative.
- +nāẓir al-maẓālim**: inspector for complaints.
- nukūl** : refusal (to take the oath).
- #rabb al-māl** : capital provider; investor.
- rahn** : pledge; pawn; security.
- +rasā'il** : collection of fatāwā.

- riḍā** : consent.
rukṇ : essential element.
ṣabī : minor.
#saḥīḥ : foolish; irresponsible; prodigal.
#ṣafqah : striking a deal (by handshake).
ṣaghīr : minor.
ṣāhib al-sūq: inspector of the market.
ṣaḥīḥ : valid; legally effective.
#ṣakk : written document; cheque.
salam : contract for delivery with prepayment.
ṣarf : exchange (of money and precious metals).
ṣarīḥ : explicit (declaration).
shahādah : testimony; evidence of witnesses.
shāhid : witness.
sharīk : partner.
sharikah : partnership.
shart : prerequisite; condition; stipulation.
shirāʾ : purchase.
shurūṭ : ‘stipulations’; legal formularies.
siḥill : written judgement of the qāḍī.
simsār : broker.
siyāsah : ‘policy’; administrative justice.
#siyāsah sharʿiyyah: sharʿah-oriented policy; policy within the
 bounds assigned to it by the sharʿah.
suftajah : bill of exchange.
ṣulḥ : amicable settlement.
#sunnah : precedent; established practice.
#taʿaddī : fault; illicit; tort; transgression.
+ taʾmīn : insurance.
+ tabarruʿ : gratuitous contract.
+ taḥkīm : arbitration.
+ tafrīt : negligence.
tājir : trader.
taqābuḍ : taking possession reciprocally.
taṣarruf : capacity to dispose.

- taslīm** : delivery.
- ta‘zīr** : discretionary punishment awarded by the Qāḍī.
- thaman** : price.
- #‘udhr** : excuse (from fulfilment of contract).
- ‘udūl** : professional witness; ‘notaries.
- +‘uhdah** : a guarantee against specific fault.
- #‘urf** : custom and usage.
- uṣūl** : the ‘roots’ or theoretical bases of Islamic law.
- wadī‘ah** : deposit.
- #wakālah** : procuration; agency; representation.
- wakīl** : deputy; agent; proxy.
- walī** : legal guardian.
- waṣf** : the circumstances of a transaction.
- #wathīqah** : written document (for giving security).
- wilāyah** : competence; jurisdiction.
- yadd** : possession.
- yamīn** : oath (underaking).
- zāhir** : literal meaning (of Qur’ān and traditions).

BIBLIOGRAPHY.

Sources in Arabic.

Books of Tafsīr [Exegesis]

al-Jaṣṣāṣ, Abū Bakr Aḥmad b. ‘Alī b. al-Rāzī [d.370H], *Aḥkām al-Qur’ān*, Cairo : Maṭba‘at al-Awqāf al-Islāmiyyah, 1335H.

Ibn al-‘Arabī, Abu Bakr Muḥammad b. ‘Abd Allāh b. Aḥmad [d.543H], *Aḥkām al-Qur’ān*, Cairo : Maṭba‘at Dār Iḥyā’ al-Kutub al-‘Arabiyyah ‘Isā Bābī al-Ḥalabī, n.d.

Muḥammad Fu’ād ‘Abd al-Bāqī, *al-Mu’jam al-Mufahras li Alfāz al-Qur’ān al-Karīm*, 1378H.

al-Qurṭubī, Abu ‘Abd Allāh Muḥammad b. Aḥmad al-Anṣārī [d.671H], *al-Jāmi‘ li Aḥkām al-Qur’ān*, Cairo : Maṭba‘at Dār al-Kutub al-Maṣriyyah, 1353H/1935M.

al-Zamakhshārī, Jār Allāh Abū al-Qāsim Maḥmūd b. ‘Umar [d.538], *al-Kashshāf ‘An Ghawāmiḍ al-Tanzīl wa ‘Uyūn al-Aqāwīl fī Wujūh al-Ta’wīl*, Cairo : Maṭba‘at al-Sharafiyyah, 1308H.

Books of Ḥadīth.

al-‘Asqalānī, Shihāb al-Dīn Abū al-Faḍl Aḥmad b. ‘Alī b. Muḥammad b. Ḥajar [d.852H], *Bulūgh al-Marām min Jam‘ Adillat al-Aḥkām* [printed with its commentary *Subul al-Salām*], Cairo : Maṭba‘at Muṣṭafā al-Bābī al-Ḥalabī, 1373H/1955M.

_____, *Fath al-Bārī li Sharḥ Ṣaḥīḥ al-Bukhārī*, Cairo : Maṭbaʿat al-Kubrā al-Amīriyyah, 1301H.

al-ʿAynī, Badr al-Dīn Maḥmūd b. Aḥmad, *ʿUmdat al-Qārī li Sharḥ al-Bukhārī*, Maṭbaʿat Dār al-Ṭibāʿah al-ʿĀmirah, 1308H.

al-Nisābūrī, Abu al-Ḥusayn Muslim b. al-Ḥajjāj al-Qushayrī [d.261H], *Ṣaḥīḥ Muslim*, [edited with commentary and index by Muḥammad Fuʾād ʿAbd al-Bāqī], Cairo : Dār Iḥyā al-Kutub al-ʿArabiyyah, n.d.

al-Ṣanʿānī, Muḥammad b. Ismāʿīl [d.1182H], *Subul al-Salām Sharḥ Bulūgh al-Marām min Jamʿ Adillat al-Aḥkām*, Cairo : Maṭbaʿat Muṣṭafā al-Bābī al-Ḥalabī, 1373H/1955M.

al-Suyūfī, Jalāl al-Dīn ʿAbd al-Raḥmān [d.911H], *Tanwīr al-Ḥawālik Sharḥ Muwaṭṭaʿ al-Imām Mālik*, Cairo : Maṭbaʿat Muṣṭafā al-Bābī al-Ḥalabī, 1370H/1951M.

_____, *Ṣaḥīḥ Muslim bi Sharḥ Nawawī*, Cairo : al-Maṭbaʿat al-Maṣriyyah, 1349H/1929M.

Dictionaries of Arabic.

al-Fayyūmī, Aḥmad b. Muḥammad b. ʿAlī b. al-Muqrī [d.770H], *al-Miṣbāḥ al-Munīr*, Cairo : al-Maṭbaʿat al-Amīriyyah, 1921M.

Ibn Manẓūr, Abu al-Faḍl Jamāl al-Dīn Muḥammad b. Mukram [d.711H], *Lisān al-ʿArab*, Beirut : Maṭbaʿat Dār Ṣādir, 1375H/1956M.

al-Rāzī, Muḥammad b. Abī Bakr b. ʿAbd al-Qādir [d.666H], *Mukhtār al-Ṣaḥḥāḥ* [arranged by Maḥmūd Khāṭir], Bulāq : Maṭbaʿat al-Amīriyyah, 1357H/1938M.

al-Shirāzī, Majd al-Dīn Muḥammad b. Yaʿqūb al-Firubdī [d.817H], *al-Qāmus al-Muḥīṭ*, Cairo : Maṭbaʿat al-Amīriyyah, 1301H.

Books of the Shāfiʿī School of Law.

al-Ghazālī, Abu Ḥāmid Muḥammad b. Muḥammad [d.505H], *Kitāb al-Wajīz fī Madhhab al-Imām al-Shāfiʿī*, Cairo : Maṭbaʿat al-Adāb, 1317H.

_____, *al-Mustasfā min ʿIlm al-Uṣūl*, Cairo , 1937.

_____, *Iḥyāʾ Ulūm al-Dīn*, Cairo : al-Dār al-Maṣriyyah al-Lubnāniyyah, n.d., 5 vols.

Ibn al-Ukhuwwah, Diyāʾ al-Dīn Muḥammad b. Muḥammad al-Qurashī [d.729H], *Maʿālim al-Qurbah fī Ahkām al-Ḥisbah* [edited with abstract of contents, glossary and indices by Reuben Levy for the trustees of E.J.W. Gibb Memorial], London : Cambridge University Press, 1938.

al-Khaṭīb, Muḥammad al-Sharbinī, *Mughnī al-Muḥtāj ilā Maʿrifat Alfāz al-Minhāj*, Cairo : Maṭbaʿat Muṣṭafā al-Bābī al-Ḥalabī, 1302H/1933M.

al-Māwardī, Abu al-Ḥasan ʿAlī [d.450H], *al-Aḥkām al-Sulṭāniyyah wa ʿl-Wilāyah al-Dīniyyah*, n.d.

al-Nawawī, Yaḥyā b. Sharaf [d.676H], *Minhāj al-Ṭālibīn*, Cairo : Maṭbaʿat Muṣṭafā al-Bābī al-Ḥalabī, n.d. [translated by E.C.Howard into English "Minhaj et-Talibin" from Van den Berg's French translation, Lahore : Law Company : 1977].

_____, *al-Majmuʿ Sharḥ al-Muhadhdhab*, Cairo, 1344-1345, 12 vols.

al-Shāfiʿī, Abu ʿAbd Allāh Muḥammad b. Idrīs [d.204H], *Kitāb al-Umm* [edited by Muḥammad Zuhri al-Najjār al-Azharī], Beirut : Dār al-Maʿrifah, n.d.

_____, *al-Risālah fī Uṣūl al-Fiqh* [Translated with an Introduction, Notes and Appendices by Majid Khadduri as *Treatise on the Foundation of Islamic Jurisprudence*], Cambridge : Islamic Texts Society, 1968.

al-Shīrāzī, Abu Ishāq Ibrāhīm b. ʿAlī b. Yūsuf al-Firubdī [d.476H.], *al-Muhadhdhab fī Fiqh Madhhab al-Imām al-Shāfiʿī*, Cairo : Maṭbaʿat Muṣṭafā al-Bābī al-Ḥalabī, 1343H.

al-Subkī, Taqī al-Dīn. "al-Ṣanīʿah fī Ḍamān al-Wadīʿah". MS. Or.92962.6, London : British Library's Oriental Collection.

_____. "Ḥusn al-Ṣanīʿah fī Ḍamān al-Wadīʿah". MS. Or.9262.7

_____. "al-Nuqūl al-Badīʿah fī Ḍamān al-Wadīʿah". MS. Or.9262.8

_____, *Fatāwā al-Subkī*, Cairo : Maktabat al-Qudsī, 1357H. 2 vols.

al-Sulamī, ʿIzz al-Dīn b. ʿAbd al-Salām, *Qawāʿid al-Aḥkām fī Maṣāliḥ al-Anām*, Cairo , 1934.

al-Suyūṭī, Jalāl al-Dīn ʿAbd al-Raḥmān [d.911H], *al-Ashbāh wa al-Nazāʾir fī Qawāʿid wa Furūʿ Fiqh al-Shāfiʿiyyah*, Cairo : Maṭbaʿah Muṣṭafā al-Bābī al-Ḥalabī, 1378H/1959M.

_____, *Tanwīr al-Ḥawālik Sharḥ Muwaṭṭaʾ Mālik*, Cairo , 1343-1353H. 3 vols.

Books of the Ḥanafī School of Law.

‘Alī Ḥaydar, *Durar al-Ḥukkām Sharḥ Majallah al-Aḥkām* [translated into Arabic from Turkish by Fahmī al-Ḥusaynī], Baghdād and Beirut : Maktabat al-Nahḍah, n.d.

al-Atasī, Muḥammad Ṭāhir and Muḥammad Khālīd, *Sharḥ al-Majallah*, Karachi : Maktabat al-Islāmiyyah, 1403. 6 vols.

al-Baghdādī, Abū Muḥammad b. Ghānim, *Kitāb Majma‘ al-Damānāt fī Madhhab Abī Ḥanīfah al-Nu‘mān*, Cairo : Maṭba‘at al-Khairiyyah, 1308H.

al-Ḥamawī, Aḥmad b. Muḥammad, *Ghamz al-‘Uyūn al-Baṣā’ir Sharḥ Kitāb al-Ashbāh wa al-Nazā’ir*, Beirut : Dār al-Kutub al-‘Ilmiyyah, 1405H/1980M.

Ibn ‘Ābidīn, Muḥammad Amīn b. ‘Umar b. ‘Abd al-‘Azīz [d.1252H], *Hāshiah Radd al-Mukhtār ‘alā ‘l-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār*, Cairo , 1966M.

Ibn Humām, Kamāl al-Dīn b. ‘Abd al-Wahīd al-Siwāsī [d.861H], *Fath al-Qadīr ‘Alā ‘l-Hidāyah Sharḥ Bidāyat al-Mubtadi’*, Cairo, 1315-1318H. 8 vols.

Ibn Nujaym, Aḥmad b. Zayn al-‘Ābidīn b. Ibrāhim [d.970H], *al-Ashbāh wa al-Nazā’ir* [edited by Muḥammad Muṭī‘ al-Ḥāfiẓ], Damascus, 1983.

_____, *Rasā’il Ibn Nujaym* [edited by al-Shaykh Khalīl al-Mis], Beirut : Dār al-Kutub al-‘Ilmiyyah, 1400H/1980M.

_____, "Risālah fī al-Safīnah idhā Ghariqat aw Inkasarat hal Yuḍminuhu am lā" MS. Or.11338.20, London : British Library’s Oriental Collection.

_____, "Fuṣūl al-Aḥkām fī Uṣūl al-Aḥkām", MS. Or.9582, London : British Library’s Oriental Collection.

Ibn Qaḍī Samāwah, Maḥmūd b. Ismā'īl [d.823H], *Jāmi' al-Fuṣulayn*, Cairo , 1300H.

al-Kāsānī, 'Alā' al-Dīn Abū Bakr b. Mas'ūd [d.578H], *Badā'i' al-Ṣanā'i' fī Tarṭīb al-Sharā'i'*, Beirut : Dār al-Kitāb al-'Arabiyy, 1402H/1982M.

al-Khaṣṣāf, Aḥmad b. 'Umar [d.261H], *al-Ḥiyal wa 'l-Makhārij* [edited by Joseph Schacht], Hanover , 1923.

Majallat al-Aḥkām al-'Adliyyah [The Ottoman Islamic Civil Code of 1876 drafted by a team of 'ulamā'] [translated into English by C.R.Tayser "The Mejelle" and also by C.A.Hooper "The Civil Law of Palestine and Trans-Jordan : Volume I The Majallah, see Hooper.]

al-Ṭaḥawī, Abū Ja'far Aḥmad b. Muḥammad [d.321H], *Kitāb Adhkār al-Ḥuqūq wa 'l-Ruhūn min Jāmi' al-Kabīr fī 'l-Shurūṭ* [edited by Joseph Schacht], Heidelberg, 1931.

_____, *Kitāb al-Shurūṭ al-Kabīr* [Kitāb al-Buyū' from this compendium has been translated by Jeanette Wakin in The Function of Document in Islamic Law], Cairo, n.d.

al-Marghinānī, Burhān al-Dīn Maḥmūd [d.593H], *al-Hidāyah* 4 vols. Lucknow, 1896-1902 [translated by Charles Hamilton, *Hedaya or Guide : A Commentary on the Mussulman Laws*. 2nd edition London, 1870.

Nizām al-Dīn et.al., *al-Fatāwā al-'Alamgiriyyah*, Calcutta : 1828-1835.

Salīm Rustam Bāz, *Sharḥ Majallah*, 1304H.

al-Sarakhsī, Abū Bakr Muḥammad b. Aḥmad b. Sahl [d.483H], *Kitāb al-Mabsūṭ*, Cairo : 1324-1331H/1906-1912.

al-Ṭarābulusī, 'Alā' al-Dīn Abū 'l-Ḥassan 'Alī b. Khalīl, *Mu'īn al-Ḥukkām fī mā Yataraddad bayn 'l-Khaṣmayn min al-Aḥkām*, Bulaq : Maṭba'ah al-Amiriyyah, 1300H.

Zaylaṯ, ʿUthmān b. ʿAlī, *Tabyīn al-Ḥaqāʾiq Sharḥ Kanz al-Daqāʾiq*, Cairo and Bulaq, 1313H. 6 vols.

Books of Mālikī School of Law.

al-Dardīr, Abū ʿl-Barakāt Aḥmad b. Muḥammad al-ʿAdawī [d.1200H], *al-Sharḥ al-Kabīr ʿAlā ʿl-Mukhtaṣar Khaṭīl*, in the margin of al-Dusuqī, *Hāshiyyah*, Cairo : Maṭbaʿat Dār Iḥyāʾ al-Kutub al-ʿArabiyyah, 1353H/1934.

_____, *al-Sharḥ al-Ṣaghīr ʿAlā Aqrab al-Masālik li Madhhab al-Imām Mālik*, Cairo : Maṭbaʿat Dār Iḥyāʾ al-Kutub al-ʿArabiyyah, 1372H/1952M.

al-Dusuqī, Shams al-Dīn Muḥammad b. Aḥmad b. ʿArafah [d.1230H.], *Hāshiat al-Dusuqī ʿAlā al-Sharḥ al-Kabīr li Abī ʿl-Barakāt Sīdī Aḥmad al-Dardīr [ʿAlā Khaṭīl]*, Bulaq, 1295H.

Ibn Farḥūn, Burhān al-Dīn Abī ʿl-Wafāʾ Ibrahim b. ʿAlī [d.799H], *Tabṣirat al-Hukkām fī Uṣūl al-Aqdiyyah wa Manāhiḥ al-Aḥkām*, Cairo : al-Maṭbaʿat al-Bahiyyah, 1302H.

Ibn Juzay, Muḥammad b. Aḥmad al-Gharnatī [d.741H], *Qawānīn Aḥkām al-Sharʿiyyah wa Masāʾil al-Furūʿ al-Fiḥiyyah*, Cairo : Dār al-Fikr, n.d.

Ibn Rushd, Abū Walīd Muḥammad b. Aḥmad al-Qurṭubī [d.520H], *al-Muqaddimāt al-Mumahhidāt* in Mālik b. Anās, *al-Mudawwanah al-Kubrā*, Cairo, 1323-1324H.

Ibn Rushd, Muḥammad b. Aḥmad al-Qurṭubī [d.595H], *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*, Beirut, 1981. 2 vols.

al-Jundī, Abū Ḍiyā' Khalīl b. Ishāq [d.767H], *al-Mukhtaṣar fī 'l-Fiqh* [French translation by N.Siegnette which was later translated in to English by F.X.Ruxton, *Mālikī Law*, London : Luzac and Co., 1917] Cairo : Dār Iḥyā' al-Kutub al-‘Arabiyyah, n.d.

al-Kinānī, Yaḥyā b. ‘Umar al-Andalūsī [d.208H], *Kitāb al-Nazar wa 'l-Aḥkām fī Jamī‘ Aḥwāl al-Sūq* [narration by Abū Ja‘far Aḥmad al-Qaṣriyy al-Qayrawānī], Tunis : al-Sharikat al-Tunisiyyah li ‘l-Tawzī‘, 1975.

_____, *Kitāb Aḥkām al-Sūq* [*Faṣlah min Ṣaḥīfat al-Ma‘had al-Maṣriyy bi Qalam Maḥmūd ‘Alī Makkī*], Tunis : Sharikat al-Tunisiyyah li ‘l-Tawzī‘, 1975.

Mālik b. Anas, Abū ‘Abd Allāh al-Aṣḥabī [d.179H], *al-Mudawwanah al-Kubrā bi Riwayat al-Saḥnūn* [Account of Saḥnūn b. Sa‘īd al-Tanūkhī [d.240H] according to ‘Abd al-Raḥmān b. al-Qāsim al-‘Utaqī [d.191H]] Cairo , 1323H. 16 vols.

_____, *al-Muwaṭṭa‘* [translated by ‘Ā’ishah ‘Abd al-Raḥmān and Ya‘qūb Johnson, Cambridge : 1982] [edited by Muḥammad Fu‘ād ‘Abd al-Bāqī, Cairo, 1951.]

al-Ma‘danī, Abū ‘l-Ḥassan ‘Alī b. Raḥḥāl, *Kitāb Taḍmīn al-Ṣunnā‘* [edited with introduction, translation and notes by J.Berque], Algiers: Bibliothèque Arabe-Francais XII, 1949.

Mayyārah, Muḥammad ibn Aḥmad, *Sharḥ Mayyārah ‘alā 'l-Urjuzat al-Musammāh bi Tuḥfat al-Ḥukkām* [A commentary of Ibn ‘Āṣim’s metrical compendium of Mālikī law together with supercommentary by Abū ‘Alī al-Ḥassan b. Raḥḥāl al-Ma‘danī], n.p., n.d., 2 vols. in one.

al-Quraḥī, Shihāb al-Dīn Abū ‘l-‘Abbās b. Idrīs al-Sanhājī [d.684H], *Kitāb al-Furūq*, [published together with Muḥammad ‘Alī b. Ḥusayn Muftī al-Mālikiyyah, *Tahdhīb al-Furūq wa 'l-Qawā‘id al-Sunniyyah fī 'l-Asrār al-Fiqhiyyah*, Cairo : Maṭba‘at Dār Iḥyā' al-Kutub al-‘Arabiyyah, 1345H. 4 vols.

al-Qayrawānī, Abū Muḥammad ‘Abd Allāh b. Abī Zayd [d.386H]. "al-Mukhtaṣar fī Furū‘ al-Mālikiyyah" MS. Or.6585 (1), London : British Library's Oriental Collection.

_____, *al-Risālah*, Cairo, 1936. Arabic with French translation by Lēon Bercher. *La Risāla*. Algiers, 1980.

al-Shāṭibī, Abū Ishāq Ibrāhīm b. Musā al-Gharnatī [d.790H], *al-Muwāfaqāt fī Uṣūl al-Sharī‘ah*, Cairo : n.d. 4 vols.

al-Wanshārishī, Abū ‘Abbās Aḥmad b. Yaḥyā al-Talmāsānī [d.914H], *al-Mi‘yār al-Mu‘rib wa ‘l-Jāmi‘ al-Maghrib ‘an Fatāwā Ahl Afriqiyyā wa ‘l-Andalus wa ‘l-Maghrib*, Rabat, 1401H/1981M. 12 vols.

al-Zurqānī, Muḥammad b. ‘Abd al-Bāqī [d.1122H], *Sharḥ ‘Alā Mukhtaṣar Khaṭīl*, Cairo , 1303H. 8 vols.

_____, *Sharḥ ‘Alā Muwaṭṭa’ Imām Mālik*, Cairo, 1961-1962. 5 vols.

Books of the Ḥanbalī School of law.

al-Buhūtī, Manṣūr b. Yūnus b. Idrīs [d.1051H], *Kashshāf al-Qinā‘ ‘an Matn al-Iqnā‘*, Makkah, 1394H. 6 vols.

_____, *al-Rawḍ al-Murbi‘ Sharḥ Zād al-Mustaqni‘* [edited by Aḥmad Muḥammad Shākir and ‘Alī Muḥammad Shākir], Cairo :Dār al-Turāth, n.d.

Ibn Ḥanbal, Abū ‘Abdullāh Aḥmad [d.241H], *al-Musnad*, Cairo, 1313H/1895M., 6 vols.

Ibn Qayyim al-Jawziyyah Abū ‘Abdullāh b. Bakr al-Zārī‘ [d.751H/1350], *A‘lām al-Muwaqqi‘īn ‘an Rabb al-‘Alamīn*, Beirut, 1970. 4 vols.

_____, *al-Ṭuruq al-Ḥukmiyyah fī 'l-Siyāsah al-Shar'īyyah* [edited by Muḥammad Ḥāmid al-Faqī], Beirut : Dār al-Kutub al-'Ilmiyyah, n.d.

Ibn Qudāmah, Muwaffaq al-Dīn [d.620H], *al-Mughnī*, Beirut : Dār al-Kutub al-'Ilmiyyah, n.d.12 vols.

Ibn Qudāmah al-Maqdisī, Shams al-Dīn [d.682H], *al-Sharḥ al-Kabīr* published in Ibn Qudāmah, *al-Mughnī*, Beirut : Dār al-Kutub al-'Ilmiyyah, n.d.12 vols.

Ibn Rajab, Abu 'l-Faraj 'Abd al-Raḥman b. Aḥmad [d.795H], *al-Qawā'id fī 'l-Fiqh al-Islāmī* [edited by Ṭahā 'Abd al-Ra'ūf Sa'd], Beirut : Dār al-Jīl, 2nd edition 1988.

Ibn Taimiyyah, Taqī al-Dīn Aḥmad b. 'Abd al-Ḥalīm [d.728H], *Majmu' Fatāwā Shaykh al-Islām Aḥmad bin Taimiyyah* [edited by 'Abd al-Raḥman b. Muḥammad b. Qāsim al-'Aṣimī], Riyāḍ : Maṭābi' Riyāḍ, 1383H. 30 vols.

_____, *al-Siyāsah al-Shar'īyyah fī Iṣlāḥ al-Rā'ī wa 'l-Ra'īyyah* [edited by Abū 'Abdullāh 'Alī b. Muḥammad al-Maghribī] Kuwait : Dār al-Qalam, 1986.

_____, *al-Ḥisbah fī 'l-Islām* [edited by Sayyid b. Muḥammad b. Abī Sa'dah] Kuwait : Maktabah Dār al-Arqam, 1983. Translated as *Public Duties in Islam* by Mukhtar Holland, Leicester : The Islamic Foundation, 1982.

al-Qārī, Aḥmad b. 'Abdullāh, *Majallat al-Aḥkām al-Shar'īyyah* [edited by 'Abd al-Wahhāb Ibrāhīm Abū Sulaymān and Muḥammad Ibrāhīm Aḥmad 'Alī] Jeddah : Tihāmah Publications, 1401H/1981M.

Secondary Sources in Arabic.

‘Abd al-Ghaffār Ibrāhīm Ṣālīḥ, *al-Iflās fī al-Sharī‘ah al-Islāmiyyah : Dirāsāt Muqāranah*, Cairo : Maṭba‘ah al-Sa‘ādah, 1980.

‘Abd al-Nāṣir Tawfīq al-‘Aṭṭār, *Nazariyyah al-Ajal fī ‘l-Iltizām fī al-Sharī‘ah al-Islāmiyyah wa ‘l-Qawānīn al-‘Arabiyyah*, n.d.

‘Abd al-Razzāq Aḥmad al-Sanhūrī, *Maṣādir al-Ḥaqq fī ‘l-Fiqh al-Islāmiyy*, Cairo : Dār al-Fikr, n.d. 6 vols. in 2.

Aḥmad Muḥammad Malījī, *al-Niẓām al-Qaḍā’ī al-Islāmī*, Cairo : Dār al-Tawfīq al-Namudhajiyyah, 1984.

Aḥmad al-Sa‘īd Sharaf al-Dīn, *‘Uqūd al-Ta’mīn wa ‘Uqūd Ḍamān al-Istithmār : Wāqi‘unā al-Ḥāliyy wa Ḥukmuhā al-Shar‘iyy*, 1986.

Aḥmad al-Ṭāhir Muḥammad Hārūn, *Mudhakkirāt al-Tawthīqāt al-Shar‘iyyah*, Cairo : Maṭba‘at al-Azhar, 1952.

‘Alā al-Dīn Kharūfah, *‘Aqd al-Qarḍ fī al-Sharī‘ah al-Islāmiyyah wa ‘l-Qānūn al-Waḍ‘ī*, Beirut : Dār Iqrā’, 1982.

‘Alī al-Khafīf, *al-Ḍamān fī ‘l-Fiqh al-Islāmī*, Cairo : 1970.

_____, *Aḥkām al-Mu‘āmalāt al-Shar‘iyyah*, Cairo : 1948.

‘Alī Qurā‘ah, *Kitāb al-Uṣūl al-Qaḍā’iyyah fī ‘l-Murāfa‘āt al-Shar‘iyyah*, Cairo : Maṭba‘at al-Nahḍah, 1925.

‘Alī Aḥmad al-Sālus, *al-Mu‘āmalāt al-Māliyyah al-Mu‘āṣirah fī Ḍaw’ al-Sharī‘ah al-Islāmiyyah*, Kuwait : Maktabat al-Falāḥ, 1986.

_____, *al-Kafālah fī Ḍaw’ al-Sharī‘ah al-Islāmiyyah*, Kuwait : Dār al-Falāḥ, 1986.

As'ad Diyāb, *Ḍamān 'Uyūb al-Mabī' al-Khafiyyah : Dirāsāt Muqāranah bayn al-Qānūn al-Lubnānī wa 'l-Sharī'ah al-Islāmiyyah wa 'l-Qawānīn al-Ḥadīthah al-'Arabiyyah wa 'l-Awrūba* h, Beirut : Dār Iqrā', 1983.

al-Dimashqī, Abū Ja'far b. 'Alī, *Kitāb al-Ishārah ilā Maḥāsin al-Tijārah wa Ma'rīfat al-A'rāḍ wa Radī'tihā wa Ghushūsh al-Mudlisīn fihā* [edited and introduced by Fahmī Sa'd] , Cairo : 1983 [First edition 1900].

Fathī al-Darīnī, *Naẓariyyat al-Ta'assuf fī Isti'māl al-Ḥaqq fī 'l-Fiqh al-Islāmiyy*, Cairo : Mu'assash al-Risālah, 1967.

Fathī al-Dārīnī et.al., *Ḥaqq al-Ibtikār fī 'l-Fiqh al-Islāmī al-Muqāran*, Beirut : Mu'assasah al-Risālah, 1984.

Gharīb al-Jammāl, *al-Maṣārīf wa 'l-A'māl al-Maṣrafiyyah fī al-Sharī'ah al-Islāmiyyah wa 'l-Qānūn*, Cairo : Dār al-Shurūq wa Mu'assasah al-Risālah, 1972.

Ibn Bassām, 'Abd Allāh ibn Aḥmad, *Nihāyat al-Rutbah fī Ṭalab al-Ḥisbah* [edited by Ḥusām al-Dīn al-Sammarrā'i], Beirut : 1968.

Ibn Khaldūn, 'Abd al-Raḥman b. Muḥammad, *al-Muqaddimah*, [Translated from Arabic by Franz Rosenthal as *The Muqaddimah* (An Introduction to History), Princeton: Princeton University Press, 1980.

'Isā 'Abduh, *al-'Uqūd al-Shar'īyyah al-Ḥākimah li 'l-Mu'āmalāt al-Māliyah al-Mu'āṣarah - Baḥth Muqaddam ilā Mu'tamar al-Fiqh al-Islāmī bi Madinat al-Riyāḍ 1972M/1396H*, Cairo : Dār al-I'tisām, 1977.

al-Jāzirī, 'Abd al-Raḥmān, *Kitāb al-Fiqh 'alā 'l-Madhāhib al-Arba'ah. Cairo, 1970. 4 vols.*

Kāsib 'Abd al-Karīm al-Badran, *'Aqd al-Istiṣnā' fī 'l-Fiqh al-Islāmī - Dirāsāt Muqāranah*, Dār al-Da'wah, n.d.

Maḥmūd Ḥamzah, *al-Farā'id al-Bahiyyah fī 'l-Qawā'id wa 'l-Fawā'id al-Fiqhiyyah*, Damascus : Dār al-Fikr, 1986.

Muḥammad Aḥmad Sirāj, *al-Awrāq al-Tijāriyyah fī al-Sharī'ah al-Islāmiyyah*, Cairo : Dar al-Thaqafah, 1988.

Muḥammad Bāqir al-Ṣadr, *al-Bank al-Lāribawī fī 'l-Islām*, Beirut : Dār al-Ta'āruf li 'l-Maṭbū'āt, 1980.

Muḥammad Fawzī Fayḍ Allāh, *Nazariyyat al-Ḍamān fī 'l-Fiqh al-Islāmī al-ʿAmm*, Kuwait : Maktabat Dār al-Turāth, 1983.

Muḥammad Ḥasanin, *Nazariyyah Buṭlān al-ʿAqd fī 'l-Fiqh al-Islāmī: Dirāsah Muqāranah bi 'l-Qānun al-Waḍʿī*, Algeria : al-Mu'assasat al-Waṭaniyyah, li 'l-Kitāb, 1988.

Muḥammad Muṣṭafā Shalabī, *Taʿlīl al-Aḥkām*, Beirut: Dār al-Nahḍah al-ʿArabiyyah, 1981.

_____, *al-Madkhal fī Taʿrīf bi 'l-Fiqh al-Islāmī*, Beirut: Dār al-Nahḍah al-ʿArabiyyah, 1985.

Muḥammad Qadrī Bāshā, *Murshid al-Ḥayrān ilā Maʿrifat Aḥwāl al-Insān fī 'l-Muʿāmalat al-Sharʿiyyah*, Bulaq 1308 and Cairo 1338.

Muḥammad Rawās Qalʿahjī and Ḥāmid Ṣādiq Qunaybī, *Muʿjam Lughat al-Fuqahāʾ*, Beirut : Dār al-Nafāʾis, 1985.

Muḥammad Saʿīd Ramaḍān al-Būṭī, *Dawābiṭ al-Maṣlaḥah fī al-Sharī'ah al-Islāmiyyah*, Beirut : Mu'assasat al-Risālah, 1986.

Muḥammad Ṭāhir al-ʿAshūr, *Maqāṣid al-Sharī'ah al-Islāmiyyah*, Tunis: Maktabat al-Istiḳāmah, 1366H.

Muḥammad Yūsuf Mūsā, *al-Amwāl wa Naẓariyyat al-‘Aqd fī ‘l-Fiqh al-Islāmī (ma‘ā Madkhal li Dirāsāt al-Fiqh wa Falsafatih)* : Dirāsāt Muqāranah, Cairo : Dār al-Kitāb al-‘Arabī, 1952.

Muṣṭafā Aḥmad Zarqā’, *Naẓrah ‘Āmmah fī Fikrat al-Ḥaqq wa ‘l-Iltizām wa Naẓariyyatai al-Amwāl wa ‘l-Ashkhāṣ fī ‘l-Fiqh al-Islāmiyy*, Damascus : Maṭba‘at al-Jāmi‘ah al-Sūriyyah, 1948.

_____, *al-Madkhal al-Fiqh al-‘Āmm*, Damascus : 1954.

_____, *‘Aqd al-Ta’mīn (al-Sukrah) wa Mawqif al-Sharī‘ah al-Islāmiyyah minhu* (A lecture delivered during the Usbū‘ al-Fiqh al-Islāmī), Damascus : 1961.

_____, *al-Fi‘l al-Dār wa ‘l-Damān fih*, Damascus : Dār al-Qalam, 1988M/1409H.

_____, *Sharḥ al-Qawā‘id al-Fiqhiyyah Ta’līf al-Shaykh Aḥmad b. al-Shaykh Muḥammad al-Zarqā’* [arranged and reviewed by ‘Abd al-Sattār Abu Ghuddah], Damascus : Dār al-Qalam, n.d.

Ramaḍān ‘Alī al-Sayyid al-Sharanbāṣī, *Himāyat al-Mustahlik fī ‘l-Fiqh al-Islāmī : Dirāsāt Muqāranah*, Cairo : Maṭba‘at al-Amānah, n.d.

al-Sayyid al-Sābiq, *Fiqh al-Sunnah*, Cairo : Maktabat Dār al-Turāth, n.d.

al-Sayyid ‘Alī al-Sayyid, *al-Ḥissah bi ‘l-‘Amal bayn al-Fiqh al-Islāmī wa ‘l-Qānun al-Waḍ‘ī*, Cairo : al-Majlis al-A‘lā li ‘l-Shu‘ūn al-Islāmiyyah, 1973.

al-Shayzarī, ‘Abd al-Raḥmān b. Naṣr, *Kitāb Nihāyat al-Rutbah fī Ṭalab al-Ḥisbah* [edited by al-Sayyid al-Bāz al-‘Arīnī], Cairo : Maṭba‘at Lujnat al-Ta’līf wa ‘l-Tarjamah, 1946M/1365H.

Sharaf b. ‘Alī al-Sharīf, *al-Ijārah al-Wāridah ‘alā ‘l-‘Amal al-Insān*, Saudi Arabia : Dār al-Shurūq, 1980.

al-Şiddīq Muḥammad Amīn al-Ḍarīr, *al-Gharar wa Atharuh fī 'l-Fiqh al-Islāmī*, al-Fujālah : Maktabah Dār Nashr al-Thaqāfah, 1967.

Sīdī Muḥammad al-Murīr, *Kitāb al-Abḥāth al-Sāmiah fī 'l-Maḥākīm al-Islāmiyyah*, Taṭwān : Dār al-Ṭibā'ah al-Maghribiyyah, n.d.

Şubḥī Rajab al-Maḥmaşşānī, *Falsafat al-Tashrī' fī 'l-Islām*, Beirut : 1948 [English translation by Farhat J. Ziadeh entitled *The Philosophy of Islamic Jurisprudence*, Leiden : E.J.Brill, 1964].

_____, *al-Nazariyyah al-Āmmah li 'l-Mūjabāt wa 'l-Uqūd fī al-Sharī'ah al-Islāmiyyah : Baḥth Muqāran fī 'l-Madhāhib al-Mukhtalifah wa 'l-Qawānīn al-Ḥadīthah*, Beirut : Dār al-Ġilm li 'l-Malāyīn, 1983 [3rd edition].

_____, *al-Mujtahidūn fī 'l-Qadā'*, Beirut : Dār al-Ġilm li 'l-Malāyīn, 1980.

Sulaymān Muḥammad Aḥmad, *Ḍamān al-Mutlifāt fī 'l-Fiqh al-Islāmī*, Cairo : 1975.

Wahbah al-Zuhaylī, *Nazariyyat al-Ḍamān aw Aḥkām al-Mas'ūliyyat al-Madaniyyah fī 'l-Fiqh al-Islāmī Muqāranan ma'ā 'l-Qānūn al-Waḍ'ī*, Damascus : Dār al-Fikr, 1970.

_____, *Nazariyyat al-Ḍarūrah al-Shar'iyyah Muqāranah ma'ā 'l-Qānūn al-Waḍ'ī*, Beirut : Mu'assasat al-Risālah, 1979.

_____, "Ḥaqq al-Ta'līf wa 'l-Nashr wa 'l-Tawzī'" in Faṭḥī al-Dārīnī, *Ḥaqq al-Ibtikār fī 'l-Fiqh al-Islāmī al-Muqāran*, Beirut : Mu'assasat al-Risālah, 1984.

_____, *al-Fiqh al-Islāmī wa Adillatuh*, Damascus : Dār al-Fikr, 1985. 8 vols.

_____, *Juhūd al-Taqnīn al-Fiqh al-Islāmī*, Beirut : Mu'assasat al-Risālah, 1987.

_____, *al-'Uqūd al-Musammā fī Qānūn Madanī al-Imārati wa 'l-Qānūn al-Madanī al-Urdun*, Beirut : 1990.

Sources in English and Other Languages.

‘Alī, ‘Abdullāh Yūsuf., *The Glorious Qur’ān : Translation and Commentary* [New Revised Edition], Maryland : International Institute of Islamic Thought, 1989.

Abdur Rahīm, *The Principle of Muḥammadan Jurisprudence*, London : Luzac and Company, 1971.

Abdul Kadir, Irshad, "Trademark Protection in the UAE," *Arab Law Quaterly* [1991], pp.31-47.

Aghnides, Nicholas P., *Muhammadan Theories of Finance*, Lahore, n.d.

Aḥmad, Khurshid [ed.], *Studies in Islamic Economics*, Leicester : The Islamic Foundation and The International Centre for Research in Islamic Economics King Abdul Aziz University Jeddah, 1981.

Amedroz. H.F., "The Office of Qāḍī in the Aḥkām Sulṭāniyya of Māwardī," *Journal of the Royal Asiatic Society* (1910), pt.2, pp.761-796.

_____, "The Mazālim Jurisdiction in the Aḥkām Sulṭāniyya of Māwardī," *Journal of the Royal Asiatic Society* (1911), pp.635-674.

_____, "The Ḥisba Jurisdiction in the Aḥkām Sulṭāniyya of Māwardī," *Journal of the Royal Asiatic Society* (1916), pp.77-101 and pp.287-314.

Amin, S.H., "The Theory of Changed Circumstances in International Trade," *Lloyd's Maritime and Commercial Law Quarterly* 4 [1982], pp.577-584.

_____, *Islamic Law in the Contemporary World*, Glasgow : Royston, 1985.

_____, *Middle East Legal System*, Glasgow : Royston, 1985.

Anderson, J.N.D., "Recent Development in Shari'a Law" *Muslim World* vol.XL No.4 [October 1950], pp.244-256.

_____, "Recent Development of the Shari'a II" *Muslim World* XLI No.1 [January 1951], pp.34-48.

_____, "The Shari'a and Civil Law : The Debt Owed by the New Civil Codes of Egypt and Syria to the Shari'a" *Islamic Quarterly* [1954], pp.29-54.

_____, "The Significance of Islamic Law in the World Today," *American Journal of Comparative Law* 9 [1966], pp.187-189.

Anderson, J.N.D. and Coulson N.J., "The Moslem Ruler and Contractual Obligation," *New York University Law Review* 33 [1958], pp.917-923.

_____, "Islamic Law in Contemporary Cultural Change." *Seaculum* 18 [1967], pp.13-90.

Attia, Naim, "Decennial Liability Under Egyptian Law," *Arab Law Quarterly* [Nov.1986], pp.504-524.

al-ʿAwā, Mohamad S., *Punishment in Islamic Law : A Comparative Study*, Indianapolis : American Trust Publication, 1982.

Aʿzamī, Muḥammad Muṣṭafā, *Studies in Early Ḥadīth Literature*, Indianapolis : American Trust Publication, 1978.

al-Azmeh, 'Aziz., *Islamic Law : Social and Historical Context*, London : Routledge, 1988.

Badr, G.M., "The New Egyptian Civil Code and the Unification of the Laws of the Arab Countries," *Tulane Law Review*, vol.XXX [1956], pp.299-304.

_____, "Islamic Law: Its Relation to Other Legal Systems," *American Journal of Comparative Law* 26 [1978], pp.187-198.

_____, "Islamic Law and Challenges of Modern Times." in *Law, Personalities and Politics in the Middle East* edited by James Piscatori and G.S.Harris, Colarado and Washington : Westview Press and the Middle East Institute, 1987, pp.27-45.

Baharum, Mohd. 'Alī., *Misrepresentation : A Study of English and Islamic Contract Law*, Kuala Lumpur : al-Raḥmāniah, 1988.

Ballantyne, William.M., *Legal Development in Arabia*, London : Graham and Trotman, 1980.

_____, *Commercial Law in the Middle East : The Gulf States*, London : Lloyds Publishers, 1986.

_____, "The New Civil Code of the United Arab Emirates : A Further Reassertion of the Sharī'a", *Arab Law Quarterly*, vol I pt.3 [May, 1986].

_____, "A Reassertion of the Sharī'ah : The Jurisprudence of the Gulf States," in *Islamic Law and Jurisprudence* edited by Nicholas Heer, Washington : Washington University Press, 1990, pp.149-160.

Beg, Muḥammad 'Abd al-Jabbar, "The Status of Brokers in the Middle Eastern Society in the Pre-Modern Period," *Muslim World* LXVII (1977), pp.87-90.

Bernard, Marie, "Ḥanafī Uṣūl al-Fiqh Through a Manuscript of al-Jaṣṣāṣ." *Journal of American Oriental Society* vol.105.4 [1985], pp.623-634.

Bligh-Abramski, Irit, "The Judiciary (Qādīs) as a Governmental Administrative Tool in Early Islām," *Journal of the Economic and Social History of the Orient*, vol.XXXXV (Feb.1992), pp.40-71.

Bondermann, D., "Modernization and Changing Perception of Islamic Law," *Harvard Law Review* 81 [April 1968], pp.1169-1193.

Brockelmann, C., *Geschichte der Arabischen Litteratur*, Leiden : E.J.Brill, 1943-1949 2 vols. with supplement band I-III [1937-1942].

Buckley, R.P., "The Muḥtasib," *Arabica* Tome XXXIX [March 1992], pp.59-118.

Burton, John., *The Sources of Islamic Law : Islamic Theories of Abrogation*, Edinburgh : Edinburgh University Press, 1990.

Chapra, M.Umar, *Towards a Just Monetary System*, Leicester : The Islamic Foundation, 1985.

_____, *Islam and the Economic Challenges*, Leicester : The Islamic Foundation and The International Institute of Islamic Thought, 1992.

Cheḥatā, Shafīq., *Théorie générale de l'obligation en droit musulman hanéfite*, Paris, 1969.

_____, "Les concepts de *Qabḍ Damān* et de *Qabḍ Amāna* en droit musulman Hanéfite," *Studia Islamica* 32 [1970/71], pp.89-99.

_____, "Dhimma," *Encyclopaedia of Islām (I)*, p.231.

Civil Code of the United Arab Emirates [The Law of Civil Transactions of the states of UAE], [translated into English by James Wheelen and Marjorie Hall, London, 1984.

Cohen, Hayyim J., "The Economic Background and the Secular Occupations of Muslim Jurisprudents and Traditionalists in the Classical Period of Islām", *Journal of the Economic and Social History of the Orient*, vol.XIII [1970], pp.16-88.

Colin, C.H., "Dallāl, " *Encyclopaedia of Islām* I [1913], p.102.

Coulson, Noel.J., *A History of Islamic Law*, Edinburgh : Edinburgh University Press, 1964.

_____, "Doctrine and Practice in Islamic Law : One Aspect of the Problem," *Bulletin of the School of Oriental and African Studies*, 18 [1956], pp.45-60.

_____, "Muslim Customs and Case-Law," *Die Welt des Islams*, 6 [1959-1961], pp.13-24.

_____, *Commercial Law in the Gulf States : The Islamic Legal Tradition*, London : Graham and Trotman, 1984.

De Somogyi, Joseph, "Trade in Qurʾān and Ḥadīth," *Muslim World* 52 (2) [1962], pp.110-114.

_____, "Trade in Classical Arabic Literature," *Muslim World* 55 (2) [1965], pp.131-134.

_____, "Egypt's Trade and Transport Relations with Other Islamic Lands : A Historical Survey," *Studies in Islam* 15 [July 1978], pp.164-165.

Dias, R.W.M. and Markenisis, B.S., *Tort Law*, Oxford : Oxford University Press, 1989.

Dozy, R., *Supplément aux dictinnaires arabes*, Leiden, 1881.

Dietrich, A., "Ḥawāla," *Encyclopaedia of Islām* 3 [1971], p.283.

Ebied, R.Y. and Young, M.J.L. [eds.], *Some Arabic Legal Documents of the Ottoman Period* [Supplement IV to the Annual of Leeds University Oriental Society] [With geographical notes by B.S.J. Isserlin], Leiden : E.J.Brill, 1975.

Edge, Ian David, "Development of Decennial Liability in Egypt," *Islamic Law and Jurisprudence* edited by Nicholas Heer, Washington: Washington University Press, 1990, pp.161-176.

_____, "Comparative Commercial Law of Egypt and Arabian Gulf," *Cleveland State Law Review* 74 [1985/86], pp. 129-144.

Egyptian Civil Code, [The English translation of the New Egyptian Civil Code by Messrs.Perrot, Fanner and Sims Marshall, London, 1986.

Fischel, W.J., "The Origin of Banking in Medieval Islam," *Journal of the Royal Asiatic Society* [1933], pp.339-352.

Forte, David.F., "The Comparative Lawyer and the Middle East," *American Journal of Comparative Law* 26 [1978], pp.305-307.

_____, "Lost, Strayed and Stolen : Chattel Recovery in Islamic Law," *Islamic Law and Jurisprudence* edited by Nicholas Heer, Washington : Washington University Press, 1990, pp.97-116.

Foster, Benjamin., "Agoranomos and Muhtasib," *Journal of Economic and Social History of the Orient* 13 [1970], pp.128-144.

Gerber, Haim, "The Muslim Law of Partnerships in Ottoman Court Records," *Studia Islamica* 53 [1981], pp.109-119.

Geust, A.G. [ed.], *Anson's Law of Contract*, Oxford : Oxford University Press, 1984.

Ghazali, Aidit, *Islamic Thinkers on Economics, Administration and Transactions* [vol.I], Kuala Lumpur : Quill Publisher, 1991.

Gomez, E.Garcia, "Aḥkām al-Sūq," *al-Andalus* 22 [1957], pp.253-316.

Goitein, S.D., "Commercial and Family Partnerships in the Countries of Medieval Islam," *Islamic Studies* 3 [1964], pp.315-337.

Habachy, Saba, "Property, Rights and Contracts in Muslim Law," *Columbia Law Review* 62 [1962], pp.450-473.

_____, "System of Nullities in Muslim Law," *American Journal of Comparative Law* 13 [1964], pp.61-72.

Hallaq, Wael.B., *The Gate of Ijtihād : A Study of Islamic Legal History*, Unpublished Ph.D Dissertation, University of Washington, 1983.

_____, "Considerations on the Function and Character of Sunni Legal Theory." *Journal of American Oriental Society* vol. 104.4 [1984], pp.679-689.

_____, "Brief Communication : Notes on the Term Qarīna in Islamic Legal Discourse." *Journal of American Oriental Society* vol.108 [1988], pp.475-480.

_____, "The Primacy of Qur'ān in Shāṭibī's Legal Theory in *Islamic Studies Presented to Charles J. Adams* edited by Wael B. Hallaq and Donald Little, Leiden : E.J.Brill, 1991, pp.69-91.

Hāmid, Muḥammad Elfāṭih, "The Freedom to Make Stipulations in the Islamic Law of Contract," *Journal of Islamic and Comparative Law* 6 [1976], pp.22-32.

_____, *The Role of Consent in the Formation of Contracts : A Comparative Study in English and Islamic Law*, Unpublished Ph.D Thesis, University of London, 1971.

Ḥassan, ‘Abdullāh ‘Alwī., *Sales and Trade in Early Islamic Commercial Law*, Unpublished Ph.D thesis, Edinburgh University, 1986.

al-Hassan, ‘Abd al-Wahhāb Aḥmad, "Freedom of Contract, the Doctrine of Frustration and Sanctity of Contract in Sudan Law and Islamic Law," *Arab Law Quarterly* vol.I pt.I [Nov.1985], pp.51-60.

_____, "The Doctrine of Duress [Ikrāh] in Sharī‘a, Sudan and English Law," *Arab Law Quarterly* vol.I pt.2 [Feb.1986], pp.231-237.

Ḥassan, Aḥmad., "al-Shāfi‘ī’s Role in the Development of Islamic Jurisprudence," *Islamic Studies* 5 [1966], pp.239-

_____, *The Early Development of Islamic Jurisprudence*, Islamabad : Institute of Islamic Research, 1970.

_____, "Methods of Finding the Cause of Legal Injunction in Islamic Jurisprudence." *Islamic Studies* XXV, No.I [1986], pp.11-44.

_____, "The Sources of Fiqh : A General Survey." *Islamic Studies* 29:2 [1990], pp.109-129.

Hassan, A.Y. and Hill, D.R., *Islamic Technology : An Illustrated History*, Cambridge : Cambridge University Press, 1988.

Hasanuz-Zaman, S.M., "Bay‘ Salam : Principles and Their Practical" in *An Introduction to Islamic Finance* edited by Sheikh Ghazali S. Abod et.al., Kuala Lumpur : Quill Publisher, 1992, pp.225-242.

Heer, Nicholas (ed.), *Islamic Law and Jurisprudence* : Studies in Honour of Farhat Ziadeh, Seattle and London, 1990.

Heffening, "Ṣulḥ," *Encyclopaedia of Islam* [1] vol.4, p.541.

Hill, Enid., "Comparative and Historical Study of Modern Middle Eastern Law," *American Journal of Comparative Law* 26 [1978], pp.279-304.

_____, "Islamic Law as a Source of Development of Comparative Jurisprudence : Theory and Practice from the Life and Work of Sanhūrī," *Islamic Law : Social and Historical Context* edited by 'Azīz al-Azmeh, London, 1988, pp.146-197.

Hooper, C.J., *The Civil Law of Palestine and Trans-Jordan, [vol.I: The Mejelle , Jerusalem, 1933], [vol.II : The Law of Contract, Jerusalem, 1936.]*

Hourani, George Fadl., "The Basis of Authority Consensus in Sunnite Islam," *Studia Islamica* 13 [1964], pp.21-47.

_____, *Arab Seafaring in the Indian Ocean in Ancient and Early Medieval Islamic Times*, New York, 1975.

Ibrāhīm, Aḥmad Muḥammad., *Islamic Law in Malaya* [edited by Shirle Gordon], Singapore : Malaysian Sociological Research Institute Ltd., 1965.

Idris, H. R., "Commerce Maritime et *Qirāḍ* en Barbērie Orientale," *Journal of the Economic and Social History of the Orient* 4 [1961] pp.225-239.

Imāmuddin, S.M., "al-Ḥisbah in Muslim Spain," *Islamic Culture* 37 [Jan.1963], pp.25-29.

Ismail, Abdul Halim, "Bank Islam Malaysia Berhad : Principles and Operations" in *An Introduction to Islamic Finance* edited by Sheikh Ghazali S.Abod et.al., Kuala Lumpur, Quill Publisher, 1992, pp.243-283.

_____, "The Deferred Contracts of Exchange in al-Qur'ān" in *An Introduction to Islamic Finance* edited by Sheikh Ghazali S.Abod et.al., Kuala Lumpur : Quill Publisher, 1992, pp.284-313.

Iṣlāhī, ‘Abd al-‘Azīm., *Economic Concepts of Ibn Taimiyyah*, Leicester : The Islamic Foundation, 1988.

Islamic Banking Act (1983) [Malaysia]

Jenning, R.C., "Loan and Credit in Early 17th Century Ottoman Judicial Records : The Sharia Court of Anatolian Kayseri," *Journal of the Economic and Social History of the Orient*, vol.XVI pt.II-III [1973], pp.168-216.

_____, "Kadi, Court and Legal Procedure in 17th Century Ottoman Kayseri," *Studia Islamica* 48 [1978], pp.133-172.

_____, "Limitations of the Judicial Powers of the Kadi," *Studia Islamica* 50 [1979], pp.151-184.

Johansen, Barber., *The Islamic Law on Land Tax and Rent : The Peasants' Loss of Rights as Interpreted in the Hanafite Legal Literature of the Mamlūk and the Ottoman Periods* [Exeter Arabic and Islamic Series], London : Croom Helm, 1988.

Jordan Civil Code [of Muslim Jurisprudence] [Translated and annotated by Hishām R.Hashīm], ‘Ammān : al-Tawfīq Publication, 1990.

Juynboll, Th.W., "Kafāla" *The Encyclopaedia of Islam I* [1913], pp.239-240.

Kamali, Muḥammad Hāshim, *Principles of Islamic Jurisprudence*, Kuala Lumpur : Pelanduk Publication, 1989 [revised edition by Islamic Texts Society : Cambridge, 1991.]

_____, "An Analysis of Right (Ḥaqq) in Islamic Law," *The American Journal of Islamic Social Science* vol.X No.3 (1993), pp.340-366.

_____, "Appellate Review and Judicial Independence," in *Islam and Public Law* edited by Chibli Mallat, London : Graham and Trotman, 1992, pp.49-83.

Kerr, Malcolm, *Islamic Reform : The Political and Legal Theories of Muḥammad 'Abduh and Rashīd Riḍā*, Berkeley and Los Angeles : University California Press, 1966.

Khadduri, Majid, *Islamic Conception of Justice*, London and Baltimore : John Hopkins University Press, 1984.

_____ and Liebesny, H.J., *Law in the Middle East* [vol.I Origin and Development of Islamic Law] [vol.II on various areas of law], Washington : 1955.

Khalīl b.Ishāq, *The Mālikī Law* [Translated from a French translation of Mukhtaṣar Sidī Khalīl by F.H.Ruxton], London :Luzac and Comapany, 1916.

Khan, M.Akram, "Types of Business Organisation in an Islamic Economy" in *An Introduction to Islamic Finance* edited by Sheikh Ghazali S.Abod, Kuala Lumpur : Quill Publisher, 1992, pp.212-224.

Khan, Mohsin S. and Mirakhor, Abbas, "The Framework and Practice of Islamic Banking," *Finance and Development* [Sept.1986], pp.32-36.

Klingmuller, E., "The Concept and Development of Insurance in Islamic Countries," *Islamic Culture* XLIII [Jan.1969], pp.27-37.

Kourides, P.N., "The Influence of Islamic Law in Contemporary Middle Eastern Legal Systems : The Formation and Binding Force of Contracts," *Columbia Journal of Transnational Law* 9:2 [1970], pp.384-435.

Kracke, E.A., "Early Visions of Justice for the Humble in East and West," *Journal of American Oriental Society* XVI [1976], pp.91-119.

Labīb, S., "Medieval Islamic Maritime Policy in the Indian Ocean," *Recueil de la Société Jean Bodin* 32 [1974], pp.225-241.

Lambton, A.K.S., "The Merchant in Medieval Islām," in *Theory and Practice in Medieval Persian Government* [edited by A.K.S Lambton], London : Variorum Reprints, 1980, pp.121-130.

Latham, J.D., "Observation on the Text and Translation of al-Jarṣīfī's Treatise on Ḥisba," *Journal of Semitic Studies* V [1960], pp. 124-143.

Lane, E. William, *Arabic-English Lexicon*, Cambridge: Islamic Texts Society, 1984. 8 vols in 2.

Lewcock, Ronald, "Architects, Craftsmen and Builders : Materials and Techniques," in *Architecture of the Islamic World : Its History and Social Meaning* edited by George Michell, London : Thames and Hudson, 1978 [reprint 1991], pp.112-144.

Lopez, R.S. and Raymond, I.W., *Medieval Trade in Mediterranean World*, New York, 1955.

Lieber, Alfred.E., "Eastern Business Practices and Medieval European Commerce" *Economic History Review* vol.21, no.2, [August 1968], pp.230-243.

Liebesny, Herbert.J., "Religious Law and Westernization in the Moslem Near East," *American Journal of Comparative Law* 9 [1960], pp.187-189.

_____, "Comparative Legal History : Its Role in the Analysis of Modern Near Eastern Legal Institution," *American Journal of Comparative Law* 20 [1972], pp.39-52.

Lisbon, Gideon, "Islamic Influence on Medieval Jewish Law ? Sefer Ha'arevuth [Book of Surety] of Rav Shmuel Ben Hofni Gaon and its Relationship to Islamic Law" *Studia Islamica* LXXIII [1991], pp.5-25.

Maḥmaṣṣānī, Subḥī, "Transaction in the Sharī'a," *Law in the Middle East* edited by Majid Khadduri and Herbert Liebesny, Washington D.C., 1955, pp.179-202.

_____, "Adaptation of Islamic Jurisprudence to Modern Social Needs" in *Islam in Transition : Muslim Perspectives* edited by John J. Donohue and John L. Esposito, New York and Oxford : Oxford University Press, 1982, pp.181-187. First published as "Muslims : Decadence and Renaissance" *Muslim World* 44 [1954], pp.186-191, 196-197, 199-201.

Makdisi, George, *The Rise of Colleges*, Edinburgh: Edinburgh University Press, 1981.

_____, "The Juridical Theology of Shāfiʿī : Origins and Significance of Uṣūl al-Fiqh." *Studia Islamica* [1984], pp.6-46.

Makdisi, John., "An Objective Approach to Contractual Mistake in Islamic Law," *Boston University International Law Journal* 2 [1985], pp.325; 333-334.

_____, "Legal Logic and Equity in Islamic Law," *American Journal of Comparative Law* 33 [1985], pp.63-92.

Mansbach, Willy, "Lesio Enormis in Muhammadan Law," *Bulletin of School of Oriental and African Studies* X [1940-42], pp.877-884.

Mansor, Mahsin, *Konsep Syariah Dalam Bank Islam* [The Sharīʿah Concept in the Islamic Bank], Kuala Lumpur : Bank Islam Malaysia Berhad, 1983.

Mardin, Cherif, "Some Explanatory Notes on the Origin of the Mecelle (Mejelle)," *The Muslim World* vol.L., [1960].

Margoliouth, D.S., "Omar's Instructions to the Kadi," *Journal of Royal Asiatic Society* 10 [1910], pp.307-325.

Masʿūd, Muḥammad Khālīd, *Islamic Legal Philosophy : A Study of Abū Ishāq al-Shātibī's Life and Thought*, Islamabad : Islamic Research Institute, 1977.

Makkī, Maḥmūd ʿAlī, "Aḥkām al-Sūq," *Revista del Instituto Egipcio de Estudios Islamicos* 4 [1956], pp.59-151.

McGuinness, Kevin Patrick, *The Law of Guarantee*, Toronto and London : Carswell, Sweet and Maxwell, 1986.

Meron, Yaakob, "The Mejele Tested by Its Application," *Israel Law Review*, vol.V, 2 [1970].

Muḥammad Yūsuf Mūsā, "The Liberty of the Individual in Contract and Conditions According to Muslim Law," *Islamic Quarterly* 2 [1955], pp.79-85, 252-263.

Muslehuddin, M., *Insurance and Islamic Law*, New Delhi : Adam Publishers and Distributors, 1969.

Naughton, T. and Shanmugam, B., "Interest-Free Banking : A Case Study of Malaysia," *National Westminster Bank Quarterly Review* [1990], pp.16-33.

Nielsen, Jorgen. S., "Maẓālim and Dār al-ʿAdl Under the Early Mamluks," *Muslim World* LXVI [1976], pp.114-132.

_____, *Secular Justice in an Islamic State : Maẓālim Under the Baḥrī Mamlūks* [662-789], Istanbul : Nederlands Historisch- Archaeologisch Instituut, 1985.

Noor, W.Salim W.M., *The Role of Reformative Ijtihad in the Twentieth Century*, Unpublished Ph.D Thesis, Edinburgh University, 1988.

Onar, S.S., " The Majalla," *Law in the Middle East* [edited by Majid Khadduri and Herbert Liebesny], Washington : Baltimore University Press, 1955, pp.292-308.

Piscatori, J. and Harris, G.S.[eds.], *Law, Personalities and Politics of the Middle East : Essays in Honour of Majid Khadduri*, Colorado and Washington : Westview Press and the Middle East Institute, 1987.

Price, Richard, *The Maritime Law of the Arabian Gulf Cooperation Council States*, London : Graham and Trotman, 1986.

Ramsay, Iain., *Consumer Protection : Text and Materials*, London : Weidenfeld and Nicholson, 1989.

Rayner, Susan Elizabeth, *The Theory of Contract in Islamic Law : A Comparative Analysis with Particular Reference to the Modern Legislation in Kuwait, Bahrain and the UAE*, London, Dordrecht, Boston : Graham and Trotman, 1991.

Richards, D.S. [ed.], *Islām and the Trade of Asia*, Oxford and Philadelphia, 1970.

Rispler-Chaim, Vardit., "Insurance and Semi-Insurance Transactions in Islamic History until 15th Century," *Journal of Economic and Social History of the Orient* XXXIV [], pp.142-158.

Rice-Noble, Deborah Ann, *The Principles of Islamic Maritime Law*, Unpublished Ph.D Thesis, University of London, 1988.

Roberts, R., *The Social Laws of the Qur'ān*, London : Luzac, 1980.

Rosen, Lawrence., *The Anthropology of Justice : Law as Culture in Islamic Society* [The Lewis Henry Morgan Lecture Series], Cambridge and Others : Cambridge University Press, 1989.

_____, "Responsibility and Compensatory Justice in Arab Culture and Law in *Semiotics, Self and Society* edited by Ben Lee and Greg Urban, Berlin, n.d.

Rosenthal, E.I.J., "The Role of State in Islam : Theory and Medieval Practice," *Der Islam* 50, I [April,1973], pp.1-28.

al-Saeid, Mohamed Osman Abdalla, *Aspect of Banking Law and Legal Practice in Light of the Commercial Code of the UAE*, Unpublished Ph.D thesis, University of Exeter, 1990.

Salamon, Sobri, *Bank Islam* [The Islamic Bank], Kuala Lumpur : Persatuan 'Ulamā' Malaysia, 1984.

Salih, Nabil., *Saudi Arabian and Omani Company Laws : Statutes and Sharī'a*, London : Namara Publications, 1981.

_____, *Unlawful Gain and Legitimate Profit in Islamic Law [Ribā, Gharar and Islamic Banking]*, Cambridge : Cambridge University Press, 1986.

_____, "Remedies for Breach of Contract under Islamic and Arab Laws," *Arab Law Quarterly* [1987], pp.269-290.

_____, "The Law Governing Contracts in Arabia," *International and Comparative Law Quarterly* vol.38 pt.4 [Oct.1979], pp.764-

_____, "Are the Validity and Construction of Legal Acts by Cause (Sabab)? : A Comparative Study Under Islamic and Arab Law, " *Arab Law Quarterly* 7 pt.2 [1992], pp.116-141.

Salih, Samīr., "Some Aspects of Frustrated Performance of Contracts under Middle Eastern Law," *International and Comparative Law Quarterly* 33 [Oct.1984], pp.1046-1051.

_____, *Commercial Arbitration in the Arab Middle East : A Study in Sharī'a and Statute Law*, London : Graham and Trotman, 1984.

_____, *Commercial Agency and Distibutorship in the Arab Middle East : A Study in Sharī'a and Statute Law*, London, Dordrecht, Boston : Garaham and Trotman, 1989.[volume I].

Schacht, Joseph., *An Intoduction to Islamic Law*, Oxford : Oxford University Press, 1964.

_____, "Law and Justice" *The Cambridge History of Islam*, vol 2, edited by P.M.Holt, A.K.S.Lambton and Bernard Lewis, Cambridge : Cambridge University Press, 1970, pp.539-568.

_____, "The Problem of Modern Islamic Legislation," *Studia Islamica* 13 [1960], pp.99-129.

_____, "Rahn", *Encyclopaedia of Islam* 3 [1936], p.1105.

Serjeant, R.B., "A Zaidī Manual of Ḥisbah of the 3rd Century of Hijrah," *Rivista Degli Studi Orientali*, vol.XXVIII (1953), pp.1-34.

Siddīqī, Muḥammad Nejatullāh., Muslim Economic Thinking : A Survey of Contemporary Literature in *Studies in Islamic Economics* edited by Khurshid Ahmad, Leicester : The Islamic Foundation, 1981, pp.191-315.

_____, *Partnership and Profit-Sharing in Islamic Law*, Leicester : The Islamic Foundation, 1985.

_____, *Insurance in Islamic Economy*, Leicester : The Islamic Foundation, 1985.

_____, *Banking Without Interest*, Leicester : The Islamic Foundation, 1983.

Spies, Otto., "Wadī'a", *Encyclopaedia of Islam* vol.IV,[1938], p.1079-1081.

_____, "Wakāla", *Encyclopaedia of Islam* vol.IV, [1938], p.1094-1095.

Sukru Selim Has, *Ibrahim al-Ḥalabī's Multaqā al-Abḥur : A Study of an Ottoman Compendium of Hanafite Law*, Unpublished Ph.D thesis, Edinburgh University, 1980.

Takāful Act 1984 and Regulation [Laws of Malaysia Act 312].

Taylor, T.W., and Evans, J.W., "Islamic Banking and Prohibition of Usury in Western Economic Thought," *National Westminster Bank Quarterly Review* [1987], pp.15-27.

Thani, Nik Norzrul T.N.H., *Legal Aspects of the Regulatory Framework of the Malaysian Financial System*, Unpublished Ph.D thesis, University of London, 1993.

Tyabji, Kamila., *Limited Interests in Muhammadan Law*, London: Cambridge University Press, 1949.

Tyan, Emile., "Ijāra" *Encyclopaedia of Islam* 3 [1971], p.1017.

_____, "Iflās et procédure d'exécution sur les biens en droit Musulman [Madhhab Hanafite]," *Studia Islamica* 21 [1964], pp.145-166.

_____, *La responsabilité délictuelle en droit musulman*, These Université de Lyon, 1926.

_____, *Histoire de l'Organisation Judiciaire en Pays d'Islam* (Annales De l'Université De Lyon), Paris : Librairie Du Recueil Sirey, 1938, 2 vols.

Udovitch, Abraham L., "At the Origins of the Western Commenda : Islām, Israel, Byzantium ? " *Speculum* vol.XXXVII [1962], pp.198-207.

_____, *Partnership and Profit in Medieval Islam*, Princeton : Princeton University Press, 1970.

_____, "Commercial Techniques in Early Medieval Islamic Trade," *Islām and the Trade of Asia* edited by D.S.Richards, Oxford and Philadelphia, 1970, pp.37-62.

_____, "Credit as a Means of Trade in Medieval Islamic Trade," *Journal of American Oriental Society* 87 [1967], pp.260-267.

_____, "Labor Partnerships in Medieval Islamic Law," *Journal of Economic and Social History of the Orient* 10 [1967], pp.64-80.

_____, "The Law Merchant of the Medieval Islamic World," *Classical Islamic Culture* edited by G.E.Von Grunebaum, Wiesbaden, 1970, pp.113-130.

_____, "Theory and Practice of Islamic Law : Some Evidence from the Geniza," *Studia Islamica* 32 [1970], pp.289-303.

_____, "Reflections on the Institution of Credit and Banking in Medieval Islamic Near East," *Studia Islamica* 41 [1975], pp.5-21.

_____, "Bankers Without Banks: Commerce, Banking and Society in the Islamic World of the Middle Ages" in *The Dawn of Modern Banking* edited by the Center for Medieval and Renaissance Studies, University of California Los Angeles, New Haven and London: Yale University Press, 1979, pp.255-275.

_____, "The Constitution of the Traditional Marketplace : Islamic Law and the Social Context of Exchange" in *Patterns of Modernity [vol.III] : Beyond the West* edited by S.N.Eisenstadt, New York : New York University Press, 1987, pp. 150-171.

_____, "Merchants and Amīrs : Government and Trade in Eleventh Century Egypt" *Asian and Africa [Journal of Israel Oriental Society]* 22 [1988], pp.53-72.

Uzair, Muhammad, "Some Conceptual and Practical Aspects of Interest-Free Banking," in *Studies in Islamic Economics* edited by Khurshid Ahmad, Leicester : The Islamic Foundation, 1981.

Vesey-Fitzgerald, S., *Muhammadian Law - An Abridgement (According to Various Schools)*, London, 1931.

_____, "The Alleged Debt of Islamic Law to Roman Law," *Law Quarterly Review* 67 [1951], pp.81-102.

Wakin, Jeanette., *The Function of Document in Islamic Law*, New York, 1972.

Wansbrough, J., "The Safe-Conduct in Muslim Chancery Practice," *Bulletin of School of Oriental and African Studies* XXVIII [1965], pp.483-523.

Weiss, Bernard, "Interpretation in Islamic Law : The Theory of Ijtihād" *American Journal of Comparative Law* 26 no.2 [Spring,1978], pp.199-212.

_____, "The Primacy of Revelation in Classical Islamic Legal Theory as Expounded by Sayf al-Dīn al-Āmidī." *Studia Islamica* [1984], pp.79-103.

Wickens, G.M., "al-Jarṣīfī," *Islamic Quarterly*, vol.III, No.I, [April, 1956], pp. 176-187.

Yusof, M.Fadzli, *Takāful : Islamic Alternative to Insurance*, Paper presented at Law Seminar, Kulliyah of Laws International Islamic University Malaysia, 26-27 July 1986.

Ziadeh, Farhat J., *Lawyers, the Rule of Law and Liberalism in Modern Egypt*, Stanford California : Hoover Institution of War, Revolution and Peace, 1968.

_____, "The Property Law in Egypt : Real Rights," *American Journal of Comparative Law* 26 [1978],pp.239-271.

_____, *Law and Property in the Arab World : Real Rights in Egypt, 'Irāq, Jordan, Lebanon and Syria*, London : Graham and Trotman, 1979.

_____, "al-Muwatta' as a Source of Social and Economic History of the Hījāz," *Islamic Studies* 18 [1979], pp.229-309.

Ziaul Haque, *Landlord and Peasant in Early Islam : A Study of the Legal Doctrine of Muzāra'a or Sharecropping*, Islamabad : Islamic Research Institute, 1977.

Zysow, Aron., "The Problem of Offer and Acceptance : A Study of Implied-in-Fact Contracts in Islamic and the Common Law," *Cleveland State Law Review* 34 [1985/86], pp.69-76.